Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

VOLUME I

APPENDIX

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-6

* * *

HILMAR G. MOORE, ET AL.,

v.

JOHN PLEASANT SIMS, ET AL.

* * *

APPEAL FROM THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

* * *

JURISDICTIONAL STATEMENT FILED JULY 3, 1978
PROBABLE JURISDICTION NOTED OCTOBER 30, 1978

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ARTICLE 1
CIVIL DOCKET

ARTICLE 1, DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
4/19/76	1.	Complaint. filed. No service at this time per Attorney.
4/20/76	2.	(JVS) ORDER, filed, denying Pltfs' motion for a temporary restraining order. A hearing shall be held on pltfs' application for a preliminary injunction on Thursday, April 29, 1976 at 10:30 a.m. Issued Summons and Writs to Serve
5-5-76	8.	(JVS) HEARING BEFORE THE COURT: Testimony of witnesses. Argument of counsel. COURT'S RULING: There is no pending Section 17 law suit. There is pending a Section 1106 law suit. No disposition has been made of that suit. The children are not in the legal custody of the Harris County Welfare Dept. and it is ordered that they be returned to their parents immediately, subject to further orders of this court. A request will be made for the constitution of a 3-judge court to determine the constitutionality of the State statute.
5-5-76	10.	DEFENSE, filed.
5-11-76	11.	Defts' ANSWER, filed.
5-18-76	12.	(JRB) ORDER, filed, setting up a three judge court consisting of John V. Singleton, Jr., Ross N. Sterling and Joe Ingraham. Parties ntfd. jb
5-21-76	13.	(JVS) ORDER, filed, signed 5-5-76. No pending law suit pursuant to any

		provisions of Chapter 17, Title 2, Texas Family Code; children will be returned to their parents immediately and a 3-judge court will be requested to hear the matter on the merits. Parties ntfd.
5-21-76	14.	APPLICATION FOR TEMPORARY RESTRAINING ORDER, filed.
5-21-76	15.	(JVS) TEMPORARY RESTRAINING ORDER, filed, restraining defts from picking up children. Hearing set June 1, 1976 at 9:30 A.M. Served by counsel for plaintiffs.
5-27-76	17.	(JVS) ORDER, filed, postponing the hearing set on June 1, 1976 until such time as the three-judge court can be convened. The temporary restraining order shall remain in force until the hearing and determination by the full court. Parties ntfd. rm.
6-7-76	18.	(JVS) (JI) (RNS) HEARING: Leave granted to file motions to intervene within 24 hours. Argument of counsel. Leave to amend complaint granted. Defts have 10 days to answer. Parties to proceed with discovery regarding Chapters 11, 17 and 34 of the Family Code and file agreed stipulations of fact and briefs by 5:00 P.M. July 30, 1976. Hearing before this 3-judge court set August 4, 1976 at 9:30 A.M.
6-7-76	21.	(JVS) ORDER GRANTING LEAVE TO AMEND COMPLAINT AND TO

PROCEED ON MOTION FOR PRELIMINARY INJUNCTION UPON COMPLAINT AS AMENDED, filed. Defts have until June 17, 1976 to answer amended complaint. Parties ntfd. rm.

6-7-76 22. MOTION FOR LEAVE TO FILE AMENDED PLEADING AND THAT PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION BE HEARD UPON COMPLAINT AS AMENDED, filed.

6-7-76 23. FIRST AMENDED COMPLAINT, filed. Issued (8) Summons on Marian Lockley, Raul Jimenez, Garrett Morris, Hilmar G. Moore, Marie L. Surgi, Norma Kay Estes, Thereasa J. Rhea and Gloria Jones.

6-17-76 28. Defts' Raul Jimenez, Jamie Clements, Hilmar G. Moore, Raymond Vowell, Gene Lege, Marian Lockley and Marie L. Surgi, FIRST AMENDED ANSWER to Pltfs' First Amended Complaint, filed.

6-18-76 29. (JVS) (JI) (RNS) ORDER OF PRELIMINARY INJUNCTION, filed. Defts are hereby restrained and enjoined from June 7, 1976 until this three Judge Court makes its determination of the constitutionality of the state statutes, unless extended by further order of the Court, from filing or prosecuting any state suit based on the applicable state statutes as challenged by the pltfs. Parties ntfd. jb

6-24-76 40. Defts' MOTION FOR MORE DEFINITE STATEMENT, filed. (UNOPPOSED PER LETTER)

7-16-76 58. Deft State Department of Public Welfare's MOTION PURSUANT TO RULE 17 (c), FRCP, filed. (To be heard at August 4th's hearing)

7-21-76 61. MOTION FOR CONSOLIDATION OF ACTIONS, filed. (Pltfs in CA 76-H-1120 entitled Woods, et al vs. State Department of Public Welfare, et al, want to consolidate with this case)

7-29-76 68. (JVS) DOCKET ENTRY, filed and entered, granting the filing of (1) a motion to consolidate this action with CA 76-H-1120; (2) a motion to dismiss the deft school teachers; (3) a motion to dismiss the deft Judge Lowry; (4) a motion to dismiss the deft Judge Coker; and (5) a motion by the State Department of Public Welfare; so that they will be considered by the Three-Judge Court's hearing set for August 4, 1976. All counsel concerned are reminded of the need for a stipulation on all relevant facts. Such stipulations should be filed no later than August 3, 1976. Parties ntfd. jb

8-4-76 72. Deft State Department of Public Welfare's MOTION TO DISMISS, filed.

8-4-76 (JVS) HEARING ON MOTIONS: Argument of counsel. Motion to consolidate with the Woods case denied except that the portion of the Woods

case dealing with appointment of counsel for indigent parents is consolidated. Motion to dismiss judges and teachers individually was granted. Motion for appointment of guardian ad litem denied. State's motion to dismiss the case will be heard by the full court.

8-9-76 80. (JVS) (RNS) (JI) ORDER OF DISMISSAL FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, filed, dismissing defts Gloria Jones, Theresa J. Rhea and Norma Kay Estes. Parties ntfd. rm.

8-16-76 84. (JVS) (RNS) (JMI) ORDER OF DISMISSAL OF DEFENDANT, ERNEST COKER, SR., filed and entered. Parties ntfd. jb

10-6-76 114. (JVS) ORDER, filed, Denying Plaintiffs MOTION FOR LEAVE TO AMEND. Parties ntfd. ad

10-7-76 115. (JVS) ORDER, filed, denying Defendants' MOTION for PROTECTIVE ORDER. Parties ntfd. ad

10-12-76 119. Defts' RESPONSE TO ORDER of OCTOBER 7, 1976, filed.

10-13-76 121. (JVS) ORDER, filed, The State Department of Public Welfare's Motion to Dismiss DENIED. Parties ntfd.

10-15-76 124. (JI) (JVS) (RNS), ORDER, filed. Dismissed as to defendant Robert L. Lowry, Judge of the Juvenile Court of

Harris County, Texas, as of October 15, 1975. Parties ntfd.

10-18-76 125. (JVS) (RNS) (JI), ORDER, filed. Consolidating 76-H-665 with 76-H-1120 for trial on the issue of whether there is a constitutional right to court appointed counsel for indigent parents in proceedings whereby the parent-child relationship may be temporarily or permenantly (sic) terminated. Parties ntfd. ad

10-19-76 126. MEMORANDUM in SUPPORT of PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS, filed.

10-19-76 127. TRIAL BRIEF OF PLAINTIFFS, filed.

10-19-76 128. Defendants' PROPOSED FINDINGS OF FACT, filed.

10-19-76 129. Defendants' PROPOSED CONCLUSIONS OF LAW, filed.

10-19-76 131. (JVS) ORDER, filed. Defendant MARIE L. SURGI'S MOTION TO DISMISS for Failure to State a Claim Upon Which Relief Can Be Granted, and the same is hereby, granted and the plaintiffs have and recover nothing by their suit against said defendant. Cost herein is to be borne by the plaintiffs. Parties ntfd. ad

10-26-76 (JVS)(JI)(RNS) HEARING: Opening statements. Offer of exhibits. Oral

arguments. *Pltf's offer of evidence:* Depositions of John P. Sims and Mary Carter Sims; James J. Carter; Myrtle Jean Carter, Rex Downing; Dr. Perry; Dr. Hanby, Judge Lowrey; Mr. Vowell's Answers to Interrogatories and Transcripts of previous hearings. *Defts' offer of evidence:* Depositions of Gladys Goffney; Dr. Johnstone; Dr. Smith; Juana Falcon, Gloria Jones and Theresa Rhea. Briefs due in 20 days. Reply briefs 10 days thereafter.

10-12-77 143. (JVS) (JI) (RNS) OPINION, filed. (See instrument for details.)

2-23-78 146. (JI) (JVS) (RNS) JUDGMENT, filed. (See instrument for details.) Parties ntfd. rm.

3-8-78 148. (JI) (JVS) (RNS) AMENDED JUDGMENT, filed. Parties ntfd. rm.

4-20-78 153. Def's NOTICE OF APPEAL TO THE SUPREME COURT fld. (copy ret'd to Appellant's Atty)

ARTICLE 2

COMPLAINT

ARTICLE 2, COMPLAINT

I.

This is a civil action seeking declaratory, injunctive and equitable relief. Plaintiffs seek an injunction against the deprivation, under color of the laws of the State of Texas, of their rights, privileges and immunities guaranteed under the United States Constitution. Jurisdiction is invoked pursuant to 28 U.S.C. §§1343, 2201, 2202, 2281, 2284; 42 U.S.C. §§1981 and 1983 and the Constitution of the United States, more particularly Article I, Section 9 thereof and the First, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments thereto.

This action seeks a declaratory judgment declaring repugnant to the Constitution of the United States certain Statutes of the State of Tecas (sic), namely: Title 2, Texas Family Code, Chapter 17 (Suit For Protection Of Child In Emergency) and the applicable provisions of Chapter 11 (General Provisions) and Chapter 14 (Conservatorship, Possession And Support Of Children) as used by Defendants in conjunction with the provisions of said Chapter 17, Title 2, Texas Family Code to deprive Plaintiffs of the rights, privileges and immunities secured to them by the Constitution and laws of the United States.

II.

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281 and 2284, since Plaintiffs seek an injunction to restrain the enforcement, operation and execution of certain Statutes of the State of Texas which have statewide application, on the grounds that said Statutes are violative of the Constitution and laws of the United States.

III.

The adult Plaintiffs are citizens of the United States and of the State of Texas, residing in Montgomery County, Texas, and are the parents of the minor Plaintiffs.

Likewise, the minor Plaintiffs are citizens of the United States and of the State of Texas, each of whom is presently illegally restrained in Harris County, Texas, in the custody of Defendant HARRIS COUNTY CHILD WELFARE UNIT OF THE STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS. Prior to such illegal restraint by Defendants herein, the minor Plaintiffs resided with the adult Plaintiffs in Montgomery County, Texas.

IV.

1) Defendant STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS exists pursuant to the laws of the State of Texas as a governmental agency vested by Acts of the Texas Legislature with power and authority to make and enforce rules and regulations for carrying into effect the laws and policies of the State of Texas relating to a public welfare program. This Defendant will hereinafter be referred to as TEXAS DEPARTMENT OF PUBLIC WELFARE.

2) Defendant RAYMOND VOWELL is Commissioner of the State Department of Public Welfare of the State of Texas, with offices in Austin, Travis County, Texas; is chief administrative officer of such governmental agency whose duties include statewide administration of the Texas public welfare program; and who is directly in charge of the local agencies or units of such State Department located throughout the State of Texas. This Defendant will hereinafter be referred to as VOWELL.

3) Defendant HARRIS COUNTY CHILD WELFARE UNIT OF THE STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS is the local agency of the State Department of Public Welfare for Harris County, Texas, with offices in Houston, Harris County, Texas, and is under the direct supervision and control of Defendant VOWELL. This Defendant will hereinafter be referred to as Defendant HARRIS COUNTY CHILD WELFARE.

4) Defendant GENE LEGE is Director of the Harris County Child Welfare Unit Of The State Department Of Public Welfare Of The State Of Texas, with offices in Houston, Harris County, Texas, and is chief administrative officer of such local agency whose duties include administration of the Texas public welfare program in and for Harris County, Texas, under the direct supervision and control of Defendant VOWELL. This Defendant will hereinafter be referred to as Defendant LEGE.

5) Defendant ROBERT L. LOWRY is the duly elected, qualified and acting Judge of the Juvenile Court Number One of Harris County, Texas, with offices in Houston, Harris County, Texas. This Defendant will hereinafter be referred to as Defendant LOWRY.

6) Defendant ERNEST A. COKER, SR. is the duly elected, qualified and acting Judge of the District Court of Montgomery County, Ninth Judicial District of the State of Texas, with offices in Conroe, Montgomery County, Texas.

7) Each Defendant is sued individually and in his official capacity. Relief is sought against each and all Defendants, as well as their agents, assistants, sucessors (sic), employees and all persons acting in concert or cooperation with them or at their direction.

V.

1) At all times relevant hereto the adult Plaintiffs have maintained a residence in Montgomery County, Texas; were and are employed in Harris County, Texas; and transported the three minor Plaintiffs with them daily from their said residence in Montgomery County, Texas, to attend John G. Osborne Elementary School in Houston, Harris County, Texas, for which the adult Plaintiffs have and are paying the sum of $159.00 per month tuition to the Houston Independent School District located in Harris County, Texas.

2) On March 25, 1976, while the three minor Plaintiffs were in Harris County, Texas, attending school, Defendant HARRIS COUNTY CHILD WELFARE, acting under color of §17.01, Title 2, Texas Family Code, took physical possession, custody and control of said minor Plaintiffs without notice to the adult Plaintiffs and without having obtained authority of a magistrate therefor.

3) Thereafter and on March 26, 1976, Defendant LOWRY, action under color of §17.04, Title 2, Texas Family Code entered ex parte Orders by the terms of which Defendant HARRIS COUNTY CHILD WELFARE was awarded possession, custody, care and control of the three minor Plaintiffs for a ten-day period.

4) Still later and on April 5, 1976, adult Plaintiffs made application to Defendant LOWRY for a Writ Of Habeas Corpus seeking return to them of their three minor children, which application was denied without hearing thereon, although adult Plaintiffs urged for hearing, subpoenaed witnesses therefor, and also made known to Defendants LOWRY and HARRIS COUNTY CHILD WELFARE that all Plaintiffs herein are and were residents of Montgomery County, Texas, the proper situs for any cause of action.

5) On the same date, April 5, 1976, although apprised of the place of residence of the three minor Plaintiffs, Defendant LOWRY instructed Defendant HARRIS COUNTY CHILD WELFARE to file his his (sic) Court a Petition To Terminate The Parent-Child Relationship, under color of the applicable provisions of Chapters 11, 14 and 17, Title 2, Texas Family Code, which Petition was, in fact, filed on said date. Based upon such filing and without jurisdiction or venue, Defendant LOWRY again entered ex parte Temporary Orders whereby physical possession, care, custody and control of the three minor Plaintiffs was continued in Defendant HARRIS COUNTY CHILD WELFARE.

6) Thereafter and at a date unknown to the adult Plaintiffs, Defendant LOWRY again entered an ex parte Order whereby the Petition filed by Defendant HARRIS COUNTY CHILD WELFARE on April 5, 1976, was transferred to the Court of Defendant COKER in Montgomery County, Texas, but set no date for hearing thereon.

7) Adult Plaintiffs would particularly show unto the Court that at the date of filing of this Complaint, they have not been served with any process, citation or notice of hearing, nor have they been afforded a hearing, either by the Court of Defendant LOWRY or the Court of Defendant COKER, and their three minor children remain in the physical possession, care, custody and control of Defendant HARRIS COUNTY CHILD WELFARE.

8. All Plaintiffs would further particularly show unto the Court that since March 25, 1976, up to the date of filing of this Complaint that Defendant TEXAS DEPARTMENT OF PUBLIC WELFARE, acting by and through its local agency, HARRIS COUNTY CHILD WELFARE, has caused all three minor plaintiffs to be absent from school, despite the fact that

all three are subject to the compulsory school attendance laws of the State of Texas; has refused to advise the adult Plaintiffs of the whereabouts of the three minor Plaintiffs; has refused to produce the minor Plaintiffs for medical examination by doctors of adult Plaintiffs' choice; has refused to allow adult Plaintiffs access to minor Plaintiffs; has incurred hospitalization and medical expenses for said minor Plaintiffs and has charged same to the account of adult Plaintiffs without authorization therefor; has placed one of the minor Plaintiffs in a foster home with a foster parent who is poisoning the mind of the minor Plaintiff PAUL EDWARD SIMS against his parents; by causing the minor Plaintiffs to be absent from school where they were regularly enrolled, have deprived adult Plaintiffs of property, namely, the tuition paid for such schooling, and have done so without affording adult Plaintiffs notice and due process of law; further, has required adult Plaintiffs to attend counseling selected by said Defendants for which adult Plaintiffs are advised they will be required to pay; and still further, have required adult Plaintiffs to be interviewed by a psychologist of said Defendants' choice, but for which adult Plaintiffs have been advised they will be required to pay. Defendant TEXAS DEPARTMENT OF PUBLIC WELFARE, acting by and through personnel of its local agency, Defendant HARRIS COUNTY CHILD WELFARE, has also advised adult Plaintiffs, among other things, that "If they [adult Plaintiffs] cooperate, Defendants will, perhaps, agree to return minor Plaintiffs to their custody within 60 days to 6 months." Such action toward adult Plaintiffs constitutes intimidation, duress and coercion by said Defendants under color of law.

VI.

Title 2, Texas Family Code, Chapter 17 on its fact (sic) and as used in conjunction with the applicable provisions of

Title 2, Texas Family Code, Chapters 11 and 14, and applied to all the Plaintiffs herein violates and is repugnant to the Constitution of the United States, as follows:

1) The Statutes on their face and as applied to Plaintiffs violate the First Amendment to the United States Constitution, in that the operation of the Statutes creates a chilling effect upon all the Plaintiffs in their exercise of freedom of speech, freedom of association, and right to petition for a redress of grievances.

2) The Statutes on their face and as applied to all the Plaintiffs violate the First Amendment because they are void for vagueness and sweep constitutionally protected rights within their scope and application.

3) The Statutes on their face and as applied to all the Plaintiffs violate the Fourth Amendment of the United States Constitution in that the operation of the Statutes invades their fundamental human rights to family unity and privacy by allowing seizure of the three minor Plaintiffs without notice to the adult Plaintiffs and without a duly authorized warrant for such seizure.

4) The Statutes on their face and as applied to all the Plaintiffs violate the due process clause of the Fifth and Fourteenth Amendments, in that they are void for vagueness and are uncertain, and give unconstitutional effect to acts, procedures, policies, practices and customs of State governmental agencies which violate the procedure and substantive "due process rights" of the adult Plaintiffs as additionally guaranteed by the Fifth and Sixth Amendments to the Constitution, in that the adult Plaintiffs have been denied their constitutionally-guaranteed rights solely upon information of a State governmental agency.

5) The Statutes on their face and as applied to all the Plaintiffs violate the Fifth, Sixth and Fourteenth

Amendments, in that they unconstitutionally delegate judicial authority to a State governmental agency which "in the opinion of that State governmental agency" allows such agency to make determinations that totally destroy the fundamental human rights, family unity and family privacy of Plaintiffs.

6) The Statutes on their face and as applied to all the Plaintiffs violate the self-incrimination clause of the Fifth Amendment in that Defendants TEXAS DEPARTMENT OF PUBLIC WELFARE and HARRIS COUNTY CHILD WELFARE, by inferring that cooperation on the part of adult Plaintiffs will result in Defendants' return of their minor children, elicit and obtain information and evidence which could later be used against adult Plaintiffs. In short, under color of law, said Defendants are able to coerce and intimidate the adult Plaintiffs by veiled promises to return their children.

7) The Statutes on their face and as applied to the adult Plaintiffs violate their Sixth Amendment rights to confrontation of witnesses and a speedy hearing.

8) The Statutes on their face and as applied to the three minor Plaintiffs not only violate their Sixth Amendment rights to a speedy hearing, but also their rights to counsel from the instant of seizure by Defendants.

9) The Statutes on their face and as applied to all the Plaintiffs violate their First, Ninth and Tenth Amendment rights, in that they infringe upon the category of fundamental human rights reserved by law to individuals.

10) The Statutes on their face and as applied to the adult Plaintiffs violate their Fourteenth Amendment rights by depriving them of property without due process of law.

11) The Statutes on their face and as applied to the minor Plaintiffs violate Article I, Section 9 and the Sixth and Fourteenth Amendments to the Constitution, in that said Statutes, as applied, suspend their privilege to the Writ Of Habeas Corpus, deprive them of their right to counsel while under seizure, and further deprive them of their liberty without due process of law.

12) Title 2, Texas Family Code, §17.09 on its face is repugnant to the First and Fourteenth Amendments of the Constitution in its attempt to deprive all the Plaintiffs of redress for grievance and deprivation of property and further attempts to insulate Defendants from accountability and responsibility for their acts.

VII.

Solely as a result of the grievances hereinabove specifically complained of, all of the Plaintiffs have suffered and will continue to suffer mental anguish, humiliation, embarrassment, and damage to reputation in the communities where they reside and are employed and/or attend public school, destruction of their family unity and privacy, and deprivation of property, for which they each here seek redress from Defendants in the present amount of $20,000 each.

VIII.

Accordingly, unless and until the injunctive relief in this Complaint is granted, Plaintiffs have good reason to believe and do believe their rights to freedom of speech, freedom of association, freedom of family privacy, rights to due process of law, rights to petition for a redress of grievances, the rights to counsel of minor Plaintiffs, and the fundamental human rights specifically reserved unto the people will continue to be infringed, abridged, chilled, threatened, impeded and otherwise interfered with. The relief demanded is essential to prevent interference with and deprivation of

Plaintiffs' constitutional rights. Therefore, unless the relief demanded is granted, Plaintiffs will suffer the most serious immediate and irreparable injury, in that their family unit will be totally destroyed because of deprivation of their most fundamental federal constitutional rights, for which Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that the Court will with all expediency take all steps necessary to convene a three-judge panel, hear this action at the earliest practicable date, advance this case on the docket, cause this case in every way to be expedited and heard, and upon such hearing, pray the Court to:

1) Issue a declaratory judgment declaring that Title 2, Texas Family Code, Chapter 17 and the applicable provisions of Title 2, Texas Family Code, Chapters 11 and 14 as used by Defendants in conjunction with the provisions of said Chapter 17, Title 2, Texas Family Code and applied to Plaintiffs in violation of the Constitution of the United States, are null and void on their face; and,

2) Order and direct each, every and all of the Defendants herein to deliver over instanter to Plaintiffs JOHN PLEASANT SIMS and Wife, MARY CARTER SIMS the physical possession, care, custody and control of the three minor Plaintiffs, SABRINA MARIE SIMS, PAUL EDWARD SIMS and SHAWANA EVETTE SIMS.

3) Permanently enjoin and restrain the Defendants, their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction, from use, operation, enforcement, execution and application of Title 2, Texas Family Code, Chapter 17 and the applicable provisions of Title 2, Texas Family Code, Chapters 11 and 14 used in conjunction with the provisions of Title 2, Texas Family

Code, Chapter 17, and from implementing and/or adopting rules, regulations and policies pursuant thereto; and,

4) Permanently enjoin and restrain the Defendants, their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction, from impeding, abridging, intimidating, chilling, hindering, preventing, threatening, deterring, discouraging and otherwise interfering with Plaintiffs in their exercise of the rights, privileges and immunities guaranteed to them by the Constitution and laws of the United States; and,

5) Award to each of the Plaintiffs as redress for damages to their persons and property judgment against Defendants in the sum of $20,000.00 each; and,

6) Award to the undersigned attorneys for Plaintiffs judgment against Defendants for reasonable attorney fees for services rendered herein; and,

7) Allow Plaintiffs to recover from Defendants their costs herein, and award to Plaintiffs such other relief as appears to the Court necessary, equitable or just herein.

ARTICLE 3

ANSWER

ARTICLE 3, ANSWER

Now come defendants, State Department of Public Welfare of the State of Texas, Harris County Child Welfare Unit of the State Department of Public Welfare of the State of Texas, Raymond Vowell, Commissioner of the State Department of Public Welfare of the State of Texas, and Gene Lege, Director of the Harris County Child Welfare Unit of the State Department of Public Welfare of the State of Texas, defendants herein, and file this their answer to the complaint and for such answer would respectfully show the Court the following:

1. Defendants admit the allegations contained in Part I of the Complaint insofar as they characterize the type of suit brought but otherwise defendants deny the allegations contained in Part I.

2. Defendants admit the allegations contained in Part II of the Complaint.

3. Defendants admit the allegations contained in the first paragraph of Part III of the complaint but deny the allegation contained in the second paragraph of Part III that the minor plaintiffs are illegally restrained in Harris County by the defendants.

4. Defendants admit the allegations contained in Part IV, paragraphs 1 through 7 of the complaint except insofar as paragraph 7 implies liability on behalf of the defendants and their agents, assistants, successors, employees and all persons acting in concert or cooperation with them or at their direction.

5. In answer to the factual allegation contained in Part V of the complaint, defendants respond as follows:

a. Defendants admit the allegations contained in paragraph 1;

b. Defendants admit the allegations contained in paragraph 2 except that they deny that they took physical possession, custody and control of said minor plaintiffs without notice to the adult plaintiffs;

c. Defendants admit the allegations contained in paragraph 3;

d. Defendants admit the allegations contained in paragraph 4 except that they deny that there was no hearing at all on the writ of habeas corpus;

e. Defendants admit the allegations contained in paragraph 5 except that they deny that Judge Lowry entered the referenced orders without jurisdiction;

f. Defendants admit the allegations contained in paragraph 6 and note that the transfer was ordered on April 6, 1976;

g. Defendants admit the allegations contained in paragraph 7 except to refer to paragraph "e" above which indicates their denial that there was no hearing at all on the writ of habeas corpus; and

h. Defendants deny the allegations insofar as they are identifiable in paragraph 8.

6. Defendants deny the allegations which consist of legal conclusions in Part VI, including paragraphs 1 through 12.

7. Defendants deny the allegations contained in Part VII.

8. Defendants deny the allegations contained in Part VIII.

Wherefore, defendants pray that the Court deny all relief requested by the plaintiffs and grant the

defendants any further relief to which they may show themselves entitled, including recovery of costs.

ARTICLE 4

FIRST AMENDED COMPLAINT

ARTICLE 4, FIRST AMENDED COMPLAINT

Pursuant to leave granted by Order of this Court on the 5th day of June, 1976, Plaintiffs file herewith their First Amended Complaint:

I.

This is a civil action seeking declaratory, injunctive and equitable relief. Plaintiffs seek an injunction against the deprivation, under color of the laws of the State of Texas, of their rights, privileges, liberties and immunities guaranteed under the United States Constitution.

The jurisdiction of this Court is invoked under:

(a) 28 U.S.C. §§1331, 1343, 2201, 2202, 2281, 2284; 42 U.S.C. §§1981 and 1983; and the rights, privileges and immunities secured to Plaintiffs by Article I, Section 9 and the First, Fourth, Fifth, Ninth, Tenth and Fourteenth Amendments to the Constitution of the United States;

(b) This Court's pendent jurisdiction, this being an action wherein the state and federal claims derive from a common nucleus of operative fact and are such that Plaintiffs would ordinarily be expected to try them all in a single judicial proceeding.

This action seeks a declaratory judgment declaring repugnant to the Constitution of the United States certain Statutes of the State of Texas, namely: Title 2, Texas Family Code, Chapter 34 (Report Of Child Abuse); Chapter 17 (Suit For Protection Of Child In Emergency); Chapter 11 (General Provisions); Chapter 14 (Conservatorship, Possession And Support Of Children); and Chapter 15 (Termination Of The Parent-Child Relationship), both on their face and as applied by

Defendants to deprive Plaintiffs of the rights, privileges, liberties and immunities secured to them by the Constitution and laws of the United States.

II.

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§2281 and 2284, since Plaintiffs seek an injunction to restrain the enforcement, operation and execution of certain Statutes of the State of Texas which have statewide application, on the grounds that said Statutes are violative of the Constitution and laws of the United States.

III.

1) All of the Plaintiffs are citizens of the United States and of the State of Texas, residing in Montgomery County, Texas.

2) The minor plaintiff SABRINA MARIE SIMS is the natural child of the adult plaintiffs, born to them August 16, 1967, and now age 8 years.

3) The minor plaintiff PAUL EDWARD SIMS was born December 10, 1967, is now age 8 years, and was adopted by the adult plaintiffs through the Harris County Child Welfare Unit of the Texas State Department of Public Welfare pursuant to Decree Of Adoption granted July 18, 1974, by the Juvenile Court Number One of Harris County, Texas.

4) The minor plaintiff SHAWANA EVETTE SIMS was born March 2, 1969, is now age 7 years, and was adopted by the adult plaintiffs through the Harris County Child Welfare Unit of the Texas State Department of Public Welfare pursuant to Decree Of Adoption granted August 12, 1975, by the Juvenile Court Number One of Harris County, Texas.

5) At the time of filing of the original Complaint herein on April 19, 1976, all three minor plaintiffs were illegally restrained by Defendant GENE LEGE. That such illegal restraint began with the seizure of the minor plaintiffs on March 25, 1976, and continued until May 5, 1976, when this Court ordered return of said minor plaintiffs to the possession of the adult plaintiffs after a separation of 42 days. That such seizure and illegal restraint of the minor plaintiffs was under color of provisions of Chapters 17, 34, 11, 14 and 15 of Title 2, Texas Family Code, to which Plaintiffs herein make constitutional challenge.

IV.

1) The Texas Public Welfare Act of 1941, Title 20A Vernon's Ann.Civ.St. Art. 695c, as amended, created the Texas State Board of Public Welfare. Such enactment of the Texas Legislature further provides that said Board, its agents, representatives, and employees shall constitute the Texas State Department Of Public Welfare.

The following Defendants, all of whom reside in the State of Texas, are each sued individually and in their official capacities, which are as follows:

a) RAUL JIMENEZ is Chairman; GARRETT MORRIS and HILMAR G. MOORE are Members constituting the Texas State Board Of Public Welfare, which Board is reponsible for the adoption of all policies, rules and regulations for the government of the Texas State Department Of Public Welfare in the administration of welfare activities of the State of Texas;

b) RAYMOND VOWELL is Commissioner of the Texas State Department Of Public Welfare, made responsible by said Act of

the Texas Legislature for discharging all executive and administrative functions of said Department;

c) GENE LEGE is Director of the Harris County Child Welfare Unit of the Texas State Department of Public Welfare, responsible for the local administration of the child welfare progarm (sic) in and for Harris County, Texas, under the direct control and supervision of said Board and Commissioner;

d) MARIAN LOCKLEY is Head Program Director of the Montgomery County Welfare Unit of the Texas State Department Of Public Welfare, responsible for the local administration of the public welfare program, including child welfare, in and for Montgomery County, Texas, under the direct control and supervision of said Board and Commissioner.

All of the six (6) foregoing-named Defendants will hereinafter be referred to collectively as THE STATE DEPARTMENT.

2) Defendant ROBERT L. LOWRY, in his official capacity, is the duly elected, qualified and acting Judge of the Juvenile Court Number One of Harris County, Texas, who is also sued individually.

3) Defendant ERNEST A. COKER, SR., in his official capacity, is the duly elected, qualified and acting Judge of the Juvenile Court of Montgomery County, Texas, who is also sued individually.

4) Defendant MARIE L. SURGI is a licensed, practicing physician with offices in Harris County, Texas, one of which is located on the premises of THE

STATE DEPARTMENT located at 4040 Milam Street in Houston, Texas, and is sued solely in her individual capacity.

5) Defendant GLORIA JONES is a resident of Houston, Harris County, Texas, and is sued solely in her individual capacity.

6) Defendant THERESA J. RHEA is a resident of Houston, Harris County, Texas, and is sued solely in her individual capacity.

7) Defendant NORMA KAY ESTES is a resident of Houston, Harris County, Texas, and is sued solely in her individual capacity.

V.

1) At all times relevant hereto the adult plaintiffs have maintained a residence in Montgomery County, Texas; were and are employed in Houston, Harris County, Texas; and transported the three minor plaintiffs with them daily from their said residence in Montgomery County, Texas, to attend John G. Osborne Elementary School in Houston, Harris County, Texas, for which the adult plaintiffs pay the sum of $159.00 per month tuition to the Houston Independent School District, a public school system.

2) On the morning of March 25, 1976, after classes had convened, the adult plaintiff JOHN PLEASANT SIMS went to John G. Osborne Elementary School where his three minor children were regularly enrolled for the purpose of taking them lunch money. While there, Defendant RHEA, the regular classroom teacher for minor plaintiff PAUL EDWARD SIMS, complained to his father about misbehavior and class disruptions on the part of the minor plaintiff PAUL. Acting on such information, said adult plaintiff SIMS requested and was furnished a paddle by Defendant RHEA, took the minor plaintiff PAUL to a vacant classroom

accompanied by Defendant RHEA, and spanked the child in the presence of Defendant RHEA because of her complaints about the misbehavior of said child, then left the school premises.

3) At around noon on March 25, 1976, one Rex Downing, an agent and employee of THE STATE DEPARTMENT, went to said elementary school, acting on telephone information from Defendant GLORIA JONES, the Principal of said school and immediate supervisor of Defendant RHEA, that the minor plaintiff PAUL EDWARD SIMS had been abused by his parents, which information had been communicated to Defendant JONES by Defendant RHEA, since Defendant JONES had not been present when the spanking above described had occurred. Then and there, THE STATE DEPARTMENT, acting by and through its agent and employee Rex Downing, took physical possession, custody and control of all three minor plaintiffs without prior notice to the adult plaintiffs and without prior authority or writ of a magistrate therefor, under color of the provisions of Chapters 34 and 17, Title 2, Texas Family Code.

4) Later on the same date, March 25, 1976, the three minor plaintiffs were taken to offices of THE STATE DEPARTMENT located at 4040 Milam Street, Houston, Texas, and there examined by Defendant MARIE L. SURGI in an office maintained by Defendant SURGI on said premises. The adult plaintiffs did not consent to such examination by Defendant SURGI nor authorize her reference to confidential records made by THE STATE DEPARTMENT and SURGI in the course of adoption of the minor plaintiffs PAUL and SHAWANA by the adult plaintiffs. In fact and instead, adult plaintiffs requested and urged examination of the minor plaintiffs by a physician of their choice and were refused by THE STATE DEPARTMENT. After examination by Defendant SURGI, all three minor plaintiffs were placed in foster homes of THE STATE

DEPARTMENT in locations not disclosed to the adult plaintiffs.

5) On March 26, 1976, shortly before 5:00 P.M. and some 30 hours after seizure of the minor plaintiffs, an agent and employee of THE STATE DEPARTMENT filed a Suit For Protection Of Child In Emergency in the Court of Defendant LOWRY, containing a sworn affidavit alleging abuse of all three minor plaintiffs by the adult plaintiffs, in support of which there was attached the reports and drawings made by Defendant SURGI in the course of her examinations on March 25, 1976. On the face of such reports and drawings the Defendant SURGI makes reference to prior and confidential records of the minor plaintiffs PAUL and SHAWANA made during the course of their adoption by the adult plaintiffs through THE STATE DEPARTMENT. On the face of such report of Defendant SURGI inference of incest and/or sexual abuse is made with respect to the natural child of the adult plaintiffs, SABRINA, after pelvic and vaginal examination by Defendant SURGI.

6) At about 5:00 P. M. on March 26, 1976, the suit described in the foregoing Paragraph V(5) brought by THE STATE DEPARTMENT under color of Chapter 17, Title 2, Texas Family Code, based upon information obtained under color of Chapter 34, Title 2, Texas Family Code was delivered to Defendant LOWRY. Under color of provisions of Chapter 17, Title 2, Texas Family Code, Defendant LOWRY entered ex parte Orders by the terms of which Defendant LEGE was awarded physical possession, custody and control of the three minor plaintiffs for a ten-day period. Defendant LOWRY did not require that the minor plaintiffs be brought before him, conducted no hearing, and did not appoint counsel for said minors.

7) On March 30, 1976, the adult plaintiffs learned that the minor plaintiff PAUL had been hospitalized on

account of alleged abuse by the adult plaintiffs and went to the hospital to see their minor son. During the course of such hospital visit on March 30, 1976, the adult plaintiffs learned for the first time that the minor plaintiff PAUL had been paddled by Defendant RHEA on March 25, 1976, prior to the time he was paddled by his father in the presence of Defendant RHEA. Adult plaintiffs further learned that the prior paddling by Defendant RHEA on March 25, 1976, had been administered in the presence of Defendant ESTES.

8) On March 31, 1976, adult plaintiffs filed and attempted to set for hearing in the Court of Defendant LOWRY their application to modify the ex parte Orders entered on March 26, 1976; were advised that Defendant LOWRY would not be sitting on Friday, April 2, 1976, the earliest date such application could be heard after giving required statutory notice to THE STATE DEPARTMENT; and were further advised that no other Harris County Juvenile Judge would be available to hear such application. Said application was returned to counsel for adult plaintiffs after being file marked by the Clerk of said Court and has now been admitted into evidence in this cause.

9) Having been refused hearing on the foregoing application, adult plaintiffs then filed in the Court of Defendant LOWRY their application for Writ Of Habeas Corpus and same was set for hearing on April 5, 1976. No hearing was had by Defendant LOWRY on adult plaintiffs' application for Writ Of Habeas Corpus, although adult plaintiffs urged for hearing on April 5, 1976, and caused subpoenas to be issued for attendance of witnesses at such hearing. Instead, on April 6, 1976, Defendant LOWRY transferred such application to the Court of Defendant COKER.

10) At the time on April 5, 1976, that adult plaintiffs were urging hearing on said Writ, counsel for adult plaintiffs made known to Defendant LOWRY and to

agents and employees of THE STATE DEPARTMENT that all the Plaintiffs were residents of Montgomery County, Texas, and such County was the proper venue and situs for any further action regarding the minor plaintiffs under color of provisions of Title 2, Texas Family Code.

Despite such knowledge and shortly before 5:00 P.M. on April 5, 1976, agents and employees of THE STATE DEPARTMENT filed a Suit Affecting The Parent-Child Relationship in the Court of Defendant LOWRY seeking termination of the parental rights of the adult plaintiffs with respect to all three of the minor plaintiffs under color of Chapters 11, 14 and 15, Title 2, Texas Family Code, using information obtained under color of provisions of Chapters 34 and 17 of said Title 2.

Although Defendant LOWRY'S sole action under provisions of §11.071, Title 2, Texas Family Code was to dismiss such suit with prejudice, instead Defendant LOWRY again entered ex parte Orders whereby physical possession, custody and control of the three minor plaintiffs was continued in Defendant LEGE, and did so at a time when he had neither jurisdiction nor proper venue, as urged by counsel for the adult plaintiffs.

11) Still later and on April 6, 1976, Defendant LOWRY entered further ex parte Orders on his own motion whereby the suit filed by the THE STATE DEPARTMENT on April 5, 1976, and the Application For Writ Of Habeas Corpus filed by adult plaintiffs and set for hearing but not heard on April 5, 1976, both were transferred to the Court of Defendant COKER without hearing dates set for either.

12) Thereafter and on May 4, 1976, adult plaintiffs filed in the Court of Civil Appeals for the 14th District of Texas sitting at Houston their Application For Leave To File Writ Of Habeas Corpus to seek return to them of the

minor plaintiffs, which Application was denied for lack of jurisdiction, a copy of which denial has been admitted into evidence in this cause. Counsel for adult plaintiffs made repeated requests of THE STATE DEPARTMENT for a letter stating the minor plaintiffs were, in fact, in the custody of Defendant LEGE, but were unable to obtain same to attach to their Application.

13) Plaintiffs would particularly show unto this Court that from the date of seizure of the three minor plaintiffs by THE STATE DEPARTMENT on March 25, 1976 up to May 5, 1976, the date of first hearing before this United States District Court, no citation, process or notice of hearing was issued or served upon adult plaintiffs, nor were any of the plaintiffs afforded a hearing, either by Defendant LOWRY or Defendant COKER. The three minor plaintiffs remained in the physical possession, custody and control of Defendant LEGE for a period of 42 days. On May 5, 1976, this United States District Court afforded Plaintiffs first opporunity (sic) for hearing, found the minor plaintiffs to be illegally restrained by Defendant LEGE, and ordered their return to the adult plaintiffs.

14) Still later and on May 14, 1976, after this Court had ordered return of the minor plaintiffs to the adult plaintiffs and had further requested that a three-judge panel be convened to hear and adjudicate Plaintiffs' challenge to the constitutionality of state statutes, one Carol B. Jones, a Montgomery County agent and employee of THE STATE DEPARTMENT filed a new and second Suit Affecting The Parent-Child Relationship in the Court of Defendant COKER under color of Chapters 11, 14 and 15, Title 2, Texas Family Code, based upon prior information obtained by Harris County agents and employees of THE STATE DEPARTMENT under color of Chapters 34 and 17, Title 2, Texas Family Code. The identical drawing and report of Defendant SURGI made March 25, 1976,

regarding the minor plaintiff PAUL EDWARD SIMS is attached to said suit filed May 14, 1976, in the Court of Defendant COKER. Said suit bears the sworn affidavit of said Carol B. Jones that the facts and matters therein contained are true. Plaintiffs allege and state that Carol B. Jones has never seen the minor plaintiff PAUL EDWARD SIMS nor personally worked with minor or adult plaintiffs and acted only for purposes of harrassment (sic) of Plaintiffs on instructions from her superiors at THE STATE DEPARTMENT and was aided and abetted therein by employees and agents of THE STATE DEPARTMENT in Harris County, Texas for express purposes of harassment (sic) and intimidation of the adult plaintiffs who had sought forum in the United States Courts.

15) Based upon the suit filed May 14, 1976, by THE STATE DEPARTMENT acting by and through its agent and employee Carol B. Jones which was purportedly supported by findings of Defendant SURGI made some 50 days prior to the time of filing of such suit, Defendant COKER issued a Writ Of Attachment for the minor plaintiff, PAUL EDWARD SIMS, under color of Chapters 11 and 14, Title 2.

16) On May 26, 1976, this Court issued its Temporary Restraining Order restraining any further action in the State Courts of the State of Texas against any, either or all of the Plaintiffs under color of any provisions of Chapters 11, 14, 15, 17 and/or 34, Title 2, Texas Family Code, and ordered hearing before the three-judge panel upon Plaintiffs' application for a preliminary injunction to be effecting (sic) pending Plaintiffs' challenge to the constitutionality of such statutes.

VI.

Chapters 34, 17, 11, 14 and 15, Title 2, Texas Family Code, on their face and as interrelated and applied to Plaintiffs herein violate and are repugnant to the

Constitution of the United States, as follows:

1) The Statutes on their face and as applied to all the Plaintiffs violate the First Amendment to the United States Constitution in that the operation of the Statutes creates a chilling effect upon all the Plaintiffs in their exercise of freedom of speech, freedom of family association and unity, and right to petition for a redress of grievances.

2) The Statutes on their face and as applied to all the Plaintiffs violate the First Amendment because they are void for vagueness, capable of arbitrary and capricious standards of enforcement, contain no safeguards against deprivation of fundamental human rights on account of arbitrary and capricious enforcement, and sweep constitutionally protected rights within their scope and application.

3) The Statutes on their face and as applied to all the Plaintiffs violate the Fourth Amendment of the United States Constitution in that operation of the Statutes invades their fundamental human rights to family unity and privacy and in addition, allow seizure of the three minor plaintiffs without probable cause or duly authorized warrant for such seizure.

4) The Statutes on their face and as applied to all the Plaintiffs violate the Fourth, Fifth and Fourteenth Amendments in that they allow seizure of confidential information of Plaintiffs without providing safeguards for limitation of the use and dissemination of such information.

5) The Statutes on their face and as applied to all the Plaintiffs violate the Due Process Clause of the Fifth and Fourteenth Amendments in that they are void for vagueness and are uncertain, and give unconstitutional effect to acts, procedures, policies, practices and customs of governmental agencies of the State which

violate the procedural and substantive "due process rights" of Plaintiffs as additionally guaranteed by the Fifth and Sixth Amendments to the Constitution, should Plaintiffs fail or refuse to conform to and follow such State governmental agency guidelines.

6) The Statutes on their face and as applied to Plaintiffs violate the Fifth and Fourteenth Amendments in that they unconstitutionally delegate legislative and judicial authority to a State governmental agency and vest in such agency the power to make determinations which totally control and ultimately destroy fundamental human rights of the Plaintiffs to family unity and family privacy.

7) The Statutes on their face and as applied to Plaintiffs violate the self-incrimination clause of the Fifth Amendment by providing the basis for eliciting information and evidence which could later be used against Plaintiffs to terminate their parent-child relationship. In short, under color of law, and after seizure of their minor children, adult Plaintiffs have been coerced and intimidated by veiled promises of return of their children, in violation of their Fifth Amendment rights.

8) The Statutes of their face and as applied to adult Plaintiffs contemplate and encompass possible criminal prosecutions, yet on their face and as applied to adult Plaintiffs violated their Sixth Amendment rights to speedy and public trial, to be informed of the nature and cause of the accusations against them, and rights to be confronted with the witnesses against them.

9) The Statutes on their face and as applied to the three minor Plaintiffs not only violate their Sixth Amendment rights to a speedy hearing, but also their rights to counsel from the instant of seizure and removal from their family unit.

10) The Statutes on their face and as applied to all the Plaintiffs violate the Fifth and Fourteenth Amendments by depriving them of property without due process of law.

11) The Statutes on their face and as applied to Plaintiffs violate the First, Ninth and Tenth Amendments, in that they infringe upon the category of fundamental human rights reserved by law to individuals, free and unfettered by governmental regulation.

12) The Statutes of their face and as applied to the minor Plaintiffs violate Article I, Section 9, the Sixth and Fourteenth Amendments of the Constitution by suspending their right to the Writ Of Habeas Corpus and deprive them of their liberty without due process of law and their right to counsel while under seizure and without access to their family unit.

13) §§34.03 and 17.09, Title 2, Texas Family Code on their face and as applied to Plaintiffs violate the First and Fourteenth Amendments of the Constitution and the provisions of 42 U.S.C. §1983 in that they deprive Plaintiffs of redress for grievances for deprivation of constitutionally-guaranteed rights and insulate against accountability, liability and responsibility for such deprivations on the part of those persons who have subjected or caused Plaintiffs to be subjected to deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States.

14) §§34.06 and 34.08, Title 2, Texas Family Code on their face and as applied to Plaintiffs violate the Due Process Clause of the Fifth and Fourteenth Amendments in that they unconstitutionally delegate legislative and judicial authority to a governmental agency to determine what constitutes child abuse, to chronicle such determinations in a central registry and

on to a national registry, to cloak such information with confidentiality without limitation on use and dissemination thereof other than according to rules and regulations to be adopted by the very agency to which such legislative and judicial authority is delegated, leaving within the sole discretion of such governmental agency the right to arbitrarily and capriciously set standards without guarantees or safeguards for the protection of substantive and procedural rights of due process.

VII.

All of the Plaintiffs allege and state that each of the Defendants, under color of law of the State of Texas, subjected or caused all the Plaintiffs to be subjected to deprivation of their rights, privileges and immunities secured to them by the Constitution and laws of the United States. As a proximate result of such illegal actions on the part of Defendants, Plaintiffs have and will continue to suffer mental anguish, humiliation, embarrassment, damage to reputation in the communities where they reside, are employed and/or attend school, deprivation of property, and irreparable injury, damage and harm to their family unity and privacy, for which they each here seek redress from Defendants in damages.

VIII.

Plaintiffs have reason to believe and do believe that THE STATE DEPARTMENT may have included their names in a Central Registry provided for by the state statutes herein challenged; and further, that their names may have been transmitted by THE STATE DEPARTMENT to other such registries under provisions of such statutes.

Plaintiffs herein pray the Court to require full disclosure by THE STATE DEPARTMENT of any

information of any nature concerning all the Plaintiffs placed in such Central Registry and transmitted to any other registries; to require that any such information be expunged therefrom in any places where it may have been placed or disseminated by THE STATE DEPARTMENT, in order that further and future irreparable injury, damage and harm to the reputation, employment and/or academic records and status of Plaintiffs on account thereof. Plaintiffs further pray the Court permanently to enjoin THE STATE DEPARTMENT from placing any information of whatsoever nature with respect to any of the Plaintiffs in any such registry pending adjudication of Plaintiffs' constutional (sic) challenge to such state statutes.

IX.

WHEREFORE, Plaintiffs pray that the Court will with all expediency take all steps necessary to convene a three-judge panel, hear this action at the earliest practicable date, advance this case on the docket, cause this case in every way to be expedited and heard, and upon such hearing, pray the Court to:

1) Issue a declaratory judgment declaring that Title 2, Texas Family Code, Chapters 11, 14, 15, 17 and 34 are violative of the Constitution of the United States, are null and void on their face and as applied to Plaintiffs.

2) Permanently enjoin and restrain the Defendants, their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction, from impeding, abridging, intimidating, chilling, hindering, preventing, threatenting, deterring, discouraging and otherwise interfering with Plaintiffs in their exercise of the rights, privileges and immunities guaranteed to them by the Constitution of the United States; and,

3) Permanently enjoin and restrain the Defendants,

their agents, assistants, successors, employees and all persons acting in concert and cooperation with them or at their direction from use, operation, enforcement, execution and application of Title 2, Texas Family Code, Chapters 11, 14, 15, 17 and 34, and from implementing and/or adopting rules, regulations and policies pursuant thereto; and,

4) Grant Plaintiffs punitive damages because the above-described acts and conduct of the Defendants were and are in reckless, wilful (sic) and wanton disregard of the rights and welfare of the citizens whom Defendants have an obligation to protect.

5) Grant Plaintiffs their actual damages proximately resulting from the actions of Defendants described above, which actions and conduct resulted in Plaintiffs' injury.

6) Awared (sic) to the undersigned attorneys for Plaintiffs judgment against Defendants for reasonable attorney fees for services rendered herein; and,

7) Allow Plaintiffs to recover from Defendants their costs herein, and award to Plaintiffs such other relief as appears to the Court necessary, equitable or just herein.

ARTICLE 5

FIRST AMENDED ANSWER

ARTICLE 5, FIRST AMENDED ANSWER

Now come defendants Raul Jimenez, Jamie Clements and Hilmar G. Moore, individually and as Chairman and Members, respectively, of the Texas State Board of Public Welfare; Raymond Vowell, individually and as Commissioner of the Texas State Department of Public Welfare; Gene Lege, individually and as Director of the Harris County Child Welfare Unit of the Texas State Department of Public Welfare; Marian Lockley, individually and as Head Program Director of the Montgomery County Welfare Unit of the Texas State Department of Public Welfare; and Marie L. Surgi, by and through John L. Hill, Attorney General of Texas, and make this their First Amended Answer to plaintiffs' First Amended Complaint.

1. The allegations contained in Part I are admitted only insofar as they seek to state the nature of the case brought by plaintiffs, but otherwise they are denied.

2. The allegations contained in Part II are admitted only insofar as they state the propriety of a three judge court to determine this matter, but otherwise they are denied.

3. The allegations contained in Part III are admitted except insofar as paragraph 5 thereof alleges that the minor plaintiffs were illegally restrained in which respect the allegations are denied.

4. The allegations contained in Part IV are admitted except that Garrett Morris is no longer a member of the Texas State Board of Public Welfare, but rather Jamie Clements is a member of said Board.

5. The allegations contained in Part V are admitted or denied as follows:

(a) The allegations contained in paragraph 1 are admitted;

(b) The allegations contained in paragraph 2 are denied;

(c) The allegations contained in paragraph 3 are denied;

(d) The allegations contained in paragraph 4 are denied;

(e) The allegations contained in paragraph 5 are denied;

(f) The allegations contained in paragraph 6 are admitted;

(g) The allegations contained in paragraph 7 are denied;

(h) The allegations contained in paragraph 8 are denied;

(i) The allegations contained in paragraph 9 are denied;

(j) The allegations contained in paragraph 10 are denied;

(k) The allegations contained in paragraph 11 are denied;

(l) The allegations contained in paragraph 12 are denied;

(m) The allegations contained in paragraph 13 are denied;

(n) The allegations contained in paragraph 14 are denied;

(o)The allegations contained in paragraph 15 are admitted;

(p) The allegations contained in paragraph 16 are admitted.

6. The allegations contained in Part VI are denied.

7. The allegations contained in Part VII are denied.

Wherefore, defendants pray that the Court deny all relief requested by the plaintiffs and grant the defendants any further relief to which they may show themselves entitled, including recovery of costs.

ARTICLE 6

MOTION PURSUANT TO RULE 17(c)

ARTICLE 6,
MOTION PURSUANT TO RULE 17(c),
FEDERAL RULES OF CIVIL PROCEDURE

Now comes the State Department of Public Welfare, defendant herein, and moves the Court to enter an order for the protection of the minor children of John Pleasant Sims, and wife, Mary Carter Sims, i.e., Sabrina Marie Sims, Paul Edward Sims, and Shawana Evette Sims, pursuant to Rule 17 (c) of the Federal Rules of Civil Procedure, and in support thereof would show as follows:

(1) That this case arose because the Harris County Child Welfare Unit sought to protect the children in question from abuse by the very parents who have brought this action as "next friend".

(2) That such action was only brought after physical evidence, based upon a medical examination, revealed that the minor male, Paul Sims, was found to have severe bruises all over his body (as shown by the diagram attached to pleadings introduced into evidence herein by the plaintiffs) and ulcerated skin oozing blood. The medical examination further revealed hematomas in each buttock as big as tennis balls. The minor females,Sabrina and Shawana Sims, were shown to have bruises on their backs, buttocks, and thighs.

(3) That the action herein occurred after a beating inflicted upon Paul Sims by his father, John P. Sims.

(4) That the sole object of removal of the children from the home was, according to the pleadings, filed in a State court, to afford an opportunity for investigation and to afford the parents an opportunity to attend counseling prior to return of the children to the home.

(5) That no suit to terminate the parent child relationship under Chapter 15 of the Family Code (15.01 through 15.07) was ever filed by the child welfare workers in either Harris or Montgomery County.

(6) That the parents of these children are still in need of counseling from a competent psychiatrist, psychologist, or social worker expert in the field of counseling.

(7) That a conflict of interest may exist herein between the interests of the parents and the children in that the very issue at stake herein concerns the right of the State to intervene in order to protect the children from danger to their health and physical safety and to protect the best interests of the children as contrasted with the interests of the parents.

(8) That the parents herein, John Pleasant Sims and Mary Carter Sims, ceased to use the counseling services of Blair and Rita Justice, Counselors with the University of Texas School of Public Health, with whom they had been conferring during the period of separation of children herein from their home, or any other counselors as soon as they obtained the original temporary restraining order from this Court requiring the children to be returned to the custody and control of the parents.

(9) That the parents would benefit from further counseling with a competent psychiatrist, psychologist or social worker concerning the relationship with said children and in particular with regard to the physical punishment and abuse of said children.

Wherefore, the State Department of Public Welfare prays that an order be issued pursuant to Rule 17(c): (1) appointing a guardian ad litem who shall act as the representative of the minor children,Paul Sims, Sabrina Sims and Shawana Sims, with authority to control and direct litigation, determine what the rights of said minor children are in this matter and what is

demanded to protect their interests, including engaging counsel and filing pleadings herein on their behalf; (2) requiring that the parents of Sabrina Marie Sims, Paul Edward Sims, and Shawana Evette Sims, engage in counseling with a competent psychiatrist, psychologist, or social worker, competent in the field of counseling, or continue their counseling relationship with Blair and Rita Justice, Counselors with the University of Texas School of Public Health, pending the outcome of this litigation.

ARTICLE 7

MOTION TO DISMISS

ARTICLE 7, MOTION TO DISMISS

Now come the State Department of Public Welfare, and defendants herein, and move the Court, pursuant to Rule 12(b), Federal Rules of Civil Procedure, to dismiss this cause of action for failure of the plaintiff to state a claim upon which relief may be granted, and in support thereof would show as follows:

1. This Court is barred from intervening in the proceedings of the juvenile court of Montgomery County, Texas, under the principles enunciated in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200 (1975).

2. This Court should allow the courts of the State of Texas to interpret the meaning of the Texas Family Code and the constitutionality of its provisions, which still allow for final review, if necessary, by the Supreme Court of the United States.

3. The principles of comity and federalism should be applied to preclude the intervention by this Court in a matter which may be fully adjudicated by the State courts, subject to review by the United States Supreme Court.

Wherefore, the State Department of Public Welfare, defendant herein, prays that the temporary injunction issued herein be dissolved and that this action be dismissed for failure to state a claim upon which relief may be granted.

ARTICLE 8

ORDER, DENIAL OF MOTION TO DISMISS

ARTICLE 8, ORDER

Defendant, State Department of Public Welfare, having filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b) (6), and the court having considered same, the court finds that the motion should be denied. A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Furthermore, contrary to defendant's contention, plaintiffs' cause of action is not of the nature which would require this court to refrain from interference in state court proceedings.

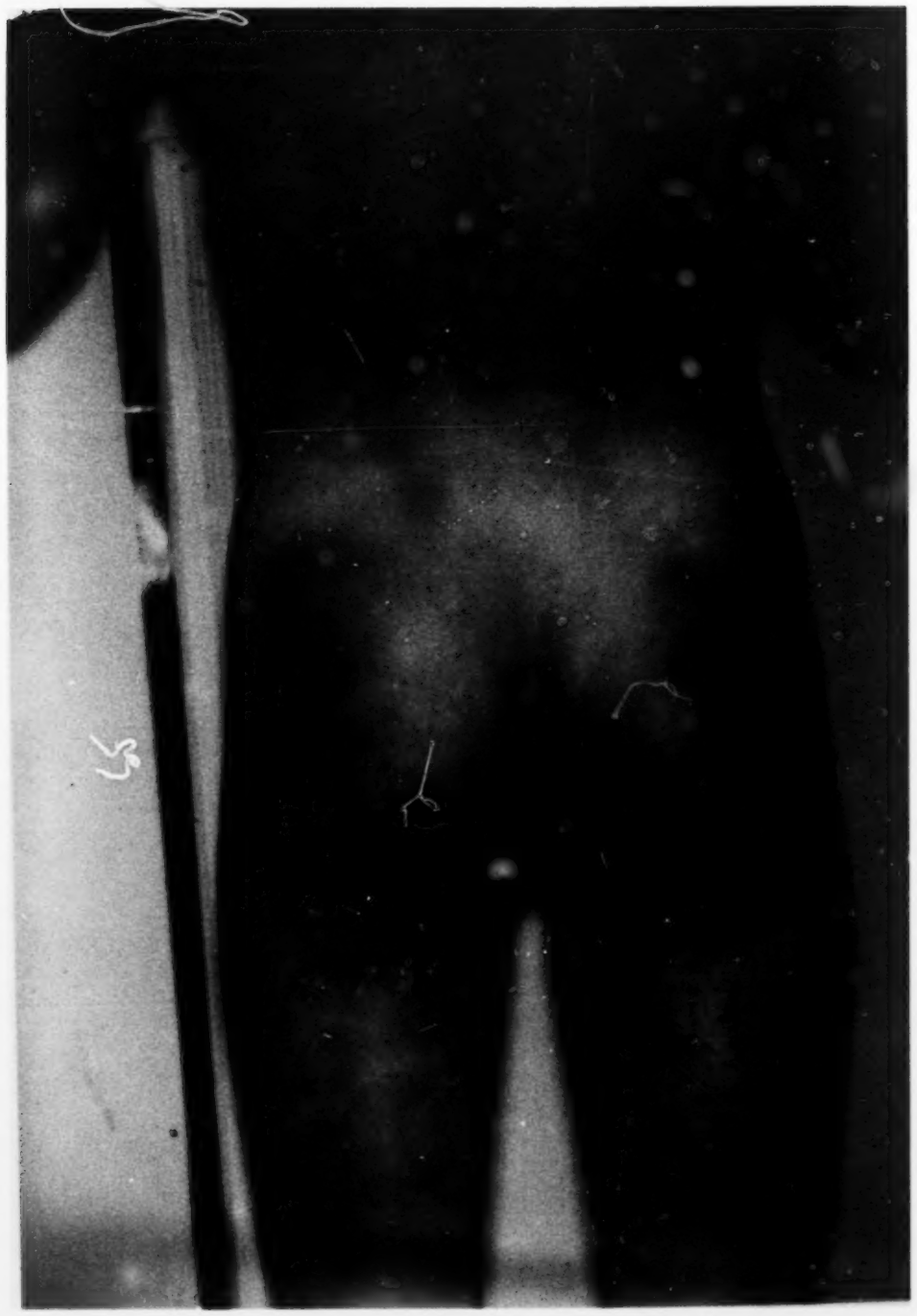
Accordingly, the State Department of Public Welfare's motion to dismiss the above-styled-and-numbered cause is hereby DENIED.

DONE at Houston, Texas, on this 13th day of October, 1976.

ARTICLE 9

DEFENDANTS' EXHIBITS 6 AND 7

ARTICLE 9, DEFENDANTS' EXHIBIT 6



DEFENDANTS' EXHIBIT 7

ARTICLE 10

MEMORANDUM OPINION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTHOUSE

HOUSTON, TEXAS 77002

CHAMBERS OF
JUDGE JOHN V. SINGLETON, JR.

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Mr. Frank Cooksey
Mr. Colin J. Carl
Office of the Attorney General
Box 12548, Capitol Station
Austin, Texas 78711

Mesdames and Gentlemen:

In re: C. A. 76-H-665
John Pleasant Sims, et al.
v. State Department of
Public Welfare, et al.

The court directs counsel for plaintiffs to prepare an appropriate final judgment consistent with the conclusions of this court as reflected in the attached memorandum opinion and to submit such judgment to the attorney general for approval as to form.

Very truly yours,

s/s
John V. Singleton

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL., Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-665
STATE DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF TEXAS, ET AL., Defendants.	)(	
DOROTHY MAE WOODS, ET AL., Plaintiffs,	)(	
V.	)(	CIVIL ACTION NO. 76-H-1120
RAUL JIMENEZ, ET AL., Defendants.	)(	

Before INGRAHAM, Circuit Judge, and
SINGLETON and STERLING, District Judges.
SINGLETON, District Judge:

This civil action is challenge to the constitutionality of portions of Chapters 11, 14, 15, 17, and 34, Title 2, TEXAS FAMILY CODE, seeking declaratory, injunctivonetary relief. The plaintiffs in the *Sims* case are two adult parents and their three minor children who seek relief from the actions of the Harris County Child Welfare Unit of the State Department of Public Welfare. Additionally, the case of *Woods v. Jimenez*,

Civil Action No. 76-H-1120, pending in this district, was consolidated with the *Sims* case solely on the issue of the right of indigent parents to counsel in suits for the termination of the parent-child relationship.

Pursuant to 28 U.S.C. §§ 2281, 2284, a three-judge district court was convened to determine the constitutional issues. The court has carefully considered the extensive briefs, the arguments of counsel, and the evidence presented and concludes that the case is properly before the court for determination, that certain portions of the Texas Family Code are violative of minimal constitutional standards, and that appropriate declaratory and injunctive relief is necessary.

The threshold issue is that of abstention in light of *Younger v. Harris*, 401 U.S. 37 (1971), *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), *Juidice v. Vail*, ___ U.S. ___, 51 L.Ed.2d 376 (1977), and *Trainor v. Hernandez*, ___ U.S. ___, 52 L.Ed.2d 486 (1977). Having viewed the instant case with an eye to the notions of comity and federalism which underlie *Younger's* policy of equitable restraint, this court concludes that abstention is not warranted and would be improper under the unique and compelling circumstances of this case.

A chronology of the events which precipitated the filing of this suit is necessary. In March, 1976, the Sims children lived with their parents in Montgomery County, Texas, and attended the John G. Osborne Elementary School in the Houston Independent School District, located in Harris County, Texas. On March 25, 1976, the Harris County Child Welfare Unit received a telephone report from the school that Paul Sims was possibly the victim of child abuse. In response to that call, caseworker Rex Downing visited the school and, on the same date, took possession of the three Sims children

pursuant to Section 17.01 of Title 2 of the TEXAS FAMILY CODE.[1] The next day, March 26, the Child Welfare Unit instituted a "Suit for the Protection of a Child in an Emergency" pursuant to Chapter 17, which was filed in Juvenile Court Number One of Harris County, Texas, Cause No. 38,295, and concerned all three of the Sims children. Also on March 26, 1976, Judge Robert L. Lowry of the Harris County Juvenile Court issued an ex parte order pursuant to Section 17.04, which has the effect of removing the children from the custody of their parents. Section 17.05 provides that such an order is of ten days in duration, and, upon the expiration of the order, the court is required to either order the restoration of the children to their parents or direct that a "Suit Affecting the Parent-Child Relationship" be filed.

On March 31, 1976, the plaintiff-parents sought to present to Judge Lowry a motion for modification of the March 26 Order, pursuant to Section 17.06. Although that section requires that a hearing be held on the motion, no hearing was in fact held. Rather, evidence before this court on May 5, 1976, indicates that the motion was not presented to Judge Lowry because of his temporary absence and was returned to counsel for the parents. Later on March 31, 1976, counsel for the parents filed with the Juvenile Court Number One, a petition for a writ of habeas corpus, Cause No. 1,069,341.

On April 5, 1976, a hearing was held before Judge Lowry on the parents' petition for a writ of habeas corpus. This was the first time since their seizure that the children were brought before the court for any hearing and the first time the parents were given any opportunity to appear. However, the merits of the dispute were never addressed. At the April 5 hearing, Judge Lowry determined that the children were residents of Montgomery County and, despite their

custody in Harris County, transferred the matter to Montgomery County. Later on April 5, at Judge Lowry's direction pursuant to Section 17.05(B) (2), the Harris County Child Welfare Unit filed a "Suit Affecting the Parent-Child Relationship" in *Harris* County. This second petition by the current defendants was filed in the same Cause No. 38,295 as the original emergency suit filed under Chapter 17. Finally, on April 5, 1976, Judge Lowry issued another ex parte temporary order pursuant to Section 11.11.[2] The order directed that the children continue in the possession of the Harris County Child Welfare Unit and purported to set a hearing upon its expiration. However, the order setting the hearing was entered in blank and to date the blanks have never been completed.

On April 6, 1976, the "Suit Affecting the Parent-Child Relationship" (Cause No. 38,295), which supplanted the emergency suit, and the habeas corpus action (Cause No. 1,069,341) were officially transferred to the District Court of Montgomery County and assigned to the docket of Judge Ernest A Coker, Sr. The transfer was apparently made *sua sponte* under Section 11.06(a) despite the requirement that it be transferred upon a timely motion.[3] It is stipulated that from April 6, 1976, to May 5, 1976, when the first hearing was conducted in this action, no notice, citation or process of any kind was served upon the plaintiff-parents with regard to the Montgomery County cases, nor were they afforded a hearing of any kind before the District Court of Montgomery County. During the entire time, the children remained in the custody of the Harris County Child Welfare Unit.

On April 19, 1976, the plaintiffs filed their Original Complaint in federal court. On May 4, 1976, the plaintiffs filed a motion for leave to file an original petition for a writ of habeas corpus with the Texas Court

of Civil Appeals for the 14th District, which was denied on the same date. The next day, the managing judge of the three-judge district court conducted an evidentiary hearing at which the court found that the children were not in the legal custody of the defendants because the ex parte temporary order under Chapter 17, dated March 26, and the ex parte order under Section 11.11, dated April 5, had both expired. The court ordered that the Sims children be returned to their parents, but did not enjoin the Department of Public Welfare from taking action under state law to properly establish a temporary conservatorship over the children. Therefore, on May 14, 1976, the Department of Public Welfare filed another "Suit Affecting the Parent-Child Relationship" in the Juvenile Court of Montgomery County. This action concerned Paul Sims only.

The Juvenile Court on May 14, 1976, established a temporary managing conservatorship for the child and set a hearing for May 21. On May 21, upon the motion of the plaintiffs, the managing judge of the three-judge panel temporarily enjoined the hearing in Montgomery County. Subsequently, after a hearing, the three-judge court extended the restraining order and enjoined any further state proceeding under the challenged statutes pending determination of the plaintiffs' constitutional challenges.

I. ABSTENTION ISSUE

As a preliminary matter, the parties are in dispute as to whether there is a pending state action. Although the Chapter 15 action filed on May 14, 1976, was obviously not pending on the date the federal action was instituted, the original "Suit Affecting the Parent-Child Relationship" which was filed on April 5, 1976, and transferred to Montgomery County from Harris County on April 6 was pending on April 19 and, along with the action filed on May 14, remains on the docket of the

District Court of Montgomery County. The plaintiffs' argument that there is no pending proceeding because the temporary orders have expired is therefore without merit. *See Steffel v. Thompson*, 415 U.S. 452 (1974); *Hicks v. Miranda*, 442 U.S. 332 (1975). Although, as we note *infra*, there is no pending state judicial proceeding with regard to some aspects of the plaintiffs complaint, abstention must still be addressed because of the proceeding filed on April 5, 1976.

The extent to which *Younger* principles apply to a case where the pending state action is civil in nature is still unclear. The first acknowledged extension of *Younger* to civil cases involved a nuisance proceeding which was "more akin to a criminal prosecution than are most civil cases." *Huffman v. Pursue, LTD., supra* at 604. However, more recently, in *Juidice v. Vail*, ___U.S.___, 51 L.Ed.2d 376 (1977), and in *Trainor v. Hernandez*, ___U.S.___, 52 L.Ed.2d 486 (1977), the Supreme Court extended the coverage of *Younger* to an even broader range of civil cases. In each of the two most recent decisions, the court has reserved the issue of whether *Younger* principles apply to all civil cases. We believe that the facts of the instant case do not require abstention and, moreover, the nature of the constitutional challenge lodged against the questioned statutory scheme presents a compelling reason for this court to serve as the "primary and powerful" source for vindication of federally protected constitutional rights. *Steffel v. Thompson*, 415 U.S. 452, 464 (1974).

In *Huffman* the Court emphasized that the fact that the state's criminal process was not involved was not determinative. Rather, a federal court considering an injunction against a pending state proceeding must carefully weigh the notions of comity and federalism and allow the state to effectuate its own policies through "a forum competent to vindicate any constitutional

objections interposed against those policies." *Huffman v. Pursue, Ltd.*, 420 U.S. at 604 (1975). The plaintiff in *Huffman* sought an injunction against the execution of a judgment entered in a pending nuisance action brought by the State of Ohio. Because such a federal injunction would disrupt "that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws," abstention was required. 420 U.S. at 605. The Court, therefore, extended the *Younger* policies of nonintervention to civil cases where the Court could find that a federal injunction would be "an offense to the State's interest... every bit as great as it would be were this a criminal proceeding." 420 U.S. at 604. It was at this early stage of the evolution of *Younger* to civil cases, that this court issued its preliminary injunction on June 18, 1976.

Since *Huffman*, this court has received the Supreme Court's guidance in *Juidice* and in *Trainor*, both expanding the original narrow application to civil cases in a manner requiring this court to carefully reflect on its judicial responsibilities with respect to the vindication of these plaintiffs' constitutional rights.

In *Judice v. Vail, supra*, *Younger* principles were held to prevent a federal court from enjoining a state judicial contempt proceeding on the basis of the weight to be given "a State's interest in contempt proceeding, through which it vindicates the regular operation of its judicial system." ___ U.S. at ___, 51 L.Ed.2d at 384. Acknowledging that such an interest is perhaps "not quite as important as is the State's interest in the enforcement of its criminal laws, . . . or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman*," the Court labeled the interest in contempt proceedings as "of sufficiently great import." ___ U.S. at ___ 51 L.Ed.2d at 384. In

finding that "the contempt power lies at the core of the administration of a State's judicial system," ___ U.S. at ___, 51 L.Ed.2d at 384, the Court continued to concern itself with a pending state action which, like a criminal prosecution or nuisance proceeding, was unique to the governmental role of a state.

In *Trainor v. Hernandez, supra*, the Court appears to have expanded the types of state civil proceedings requiring the application of *Younger* principles. In *Trainor* the State of Illinois brought a civil action against the appellees seeking a return of welfare payments alleged to have been wrongfully received and sought a writ of attachment. The three-judge court enjoined the attachment and declared the Illinois Attachment Act to be unconstitutional. In remanding to the lower court for consideration of whether the attachment statute provides a debtor with a proper forum for his constitutional challenge, the Supreme Court noted that the principles of *Younger* and *Huffman* apply to injunctions against actions "brought by the State in its sovereign capacity," ___ U.S., ___, 52 L.Ed.2d at 496, rejecting the argument that attchement was not a remedy unique to the state and emphasizing, instead, that the state was a party to the attachment in its underlying role of administering public assistance programs. The Court concluded that a federal injunction's "disruption of suits by the State in its sovereign capacity, when combined with a negative reflection on the State's ability to adjudicate federal claims" dictated abstention unless "extraordinary circumstances were present." ___ U.S. at ___, 52 L.Ed.2d at 497.

It is in this legal and factual setting that this court decides that *Younger* and its progeny do not require application of their principles to the current dispute between these plaintiffs and the State of Texas.

Although *Juidice* and *Trainor* have expanded the types of civil cases to which *Younger* extends, it is clear that neither decision purports to apply *Younger* principles to all civil litigation between a state and its citizens. *Juidice*, ___U.S. at___, 51 L.Ed.2d 385 n. 13 (1977); *Trainor*, ___U.S. at ___, 52 L.Ed.2d at 496 n.8 (1977). From this we conclude that because of the wide range of interests and circumstances that could conceivably be present in a civil dispute, the proper role of a federal court is to carefully analyze each dispute individually with an equitable view toward the principles of comity and federalism and a careful study of the state action involved.[4] This court considers the *Younger* principles inapplicable here for two reasons: the nature of the state action and the nature of the plaintiff's challenge.

First, the action taken by the State of Texas against the plaintiffs is multifaceted. Unlike a criminal prosecution, or a nuisance, contempt, or attachment proceeding, there is no single state proceeding to which the plaintiffs may look for relief on constitutional or any other grounds. Many of the challenged actions taken by the state do not and will not involve any judicial proceeding.[5] Certainly as to these, there is no pending state civil litigation about which even to consider abstention. The only pending state suit is the one pending in Montgomery County, filed on April 5, 1976. Because the dispute between the plaintiffs and the State of Texas concerns more than a single state judicial action to which plaintiffs could raise a constitutional defense, *Younger* principles are inapplicable. *See Younger*, 401 U.S. at 46 (1971). The entire statutory scheme by which Texas attempts to deal with the problem of child abuse has been challenged and should be viewed as an integrated whole. This court will not consider part of the scheme and abstain from another part. To do so would seriously jeopardize any hope for an

effective statutory scheme and, in the name of comity and federalism, do violence to the state functions those principles seek to protect.

As a second independent basis for the inapplicability of *Younger* principles, we note that the plaintiffs' constitutional challenge is directed primiarily at the legality of the children's seizure and detention for a 42-day period without a hearing. It is clear that because this issue cannot be raised as a defense in the normal course of the pending judicial proceeding, adstention would be inappropriate. *See Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9 (1975). The denial of custody of the children pending any hearing regardless of the result of the hearing, is in itself sufficient to prevent the application of *Younger*. *Cf. Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd* 414 U.S. 1139 (1974).

Even if the nature of the state action and the constitutional challenge were such as to require the application of *Younger* principles, it is clear that there exists here circumstances where, even though the principles are otherwise applicable, a federal court should not abstain. Certainly, the threatened injury to the plaintiffs is both great and immediate. As we note *infra* the constitutional issues raised by the plaintiffs reach the application of due process in an area of the greatest importance to our society, the family. The constitutional infirmities recognized by this court, if uncorrected, would cause an injury to these plaintiffs far greater than a deprivation of a mere property interest. Furthermore, it has been recognized that where, as here, the plaintiff may not raise all of his constitutional claims as a defense in a *single* state proceeding, the necessary irreparability is present. *Younger v. Harris*, 401 U.S. at 46 (1971). When reviewing a statute permitting the North Carolina

authorities to take custody of children without a hearing under certain circumstances, the court in *Newton v. Burgin, supra*, observed that "the deprivation of custody prior to the civil proceeding is an irreparable injury which is both great and immediate . . . and . . . will not be dissipated in the state proceeding."

Of course, we realize that the mere facial invalidity of a statute does not in itself justify federal interference. *Younger v. Harris*, 401 U.S. at 54 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. at 602 (1975). While it is clear that intervention is warranted where a statute is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence, and paragraph," *Watson v. Buck*, 313 U.S. 387, 402 (1941), such a finding is not the only justification for federal action. In *Younger* the Court explained:

> There may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown in the absence of the usual prerequisites of bad faith and harassment. For example, as long ago as the Buch case, supra, we indicated:
>
> > It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it. 313 U.S. at 402.
>
> Other unusual situations calling for federal intervention may also arise, but there is no point in our attempting now to specify what they might be.

401 U.S. at 53-54.

In addition to this court's finding, *infra*, that several sections of the TEXAS FAMILY CODE are "flagrantly and patently" violative of federal constitutional requirements, the "unusual" circumstances referred to in *Younger* are present here and compel this court to grant equitable relief. Recognizing that more than a "highly unusual factual situation" must be present, *Trainor v. Hernandez*, ___ U.S. at ___, 52 L.Ed.2d at 494-95 n. 7 (1977), we find the confusion, the procedural irregularities, and the absence of a fair opportunity to present constitutional claims at a meaningful time to be such as to justify federal equitable relief even if *Younger* principles did apply.

As a general expression of the extraordinary and compelling circumstances present here, this court finds an absence for these plaintiffs of "an opportunity to fairly pursue their constitutional claims in an ongoing state proceeding." *Juidice*, ___ U.S. at ___, 51 L.Ed.2d at 396 (1977) citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973).[6] Unlike the plaintiff in *Juidice*, the *Sims* plaintiffs have not failed to avail themselves of any opportunities in the state procedures. Despite serious constitutional objections to its burden-of-proof requirement, the plaintiffs sought a modification of the original ex parte order pursuant to Section 17.06. Although mandated by the statute, no hearing was afforded them. Plaintiffs also sought to raise their objections in an application for a writ of habeas corpus, but, when they were prepared to seize this opportunity to be heard, the matter was transferred to Montgomery County, and, despite the parents' presence in court earlier that day, the court issued another ex parte custody order and set a hearing in Montgomery County for an uncertain time in the future. Certainly, such efforts to earn an opportunity to be heard are more than sufficient before seeking relief in federal court on April 19, 1976.

The plaintiffs' having sought through diligent efforts an opportunity to be heard in a state proceeding, this court must conclude that whatever opportunities exist for them are not such as to allow them to "fairly pursue" their constitutional objections. In reaching such a conclusion, we are mindful that "[t]he policy of equitable restraint . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights." *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), quoted in *Trainor*, ___ U.S. at ___, 52 L.Ed.2d at 494 (1977). Analogized to a civil dispute, no such premise can be found here. This court has already chronicled the attempts by the plaintiffs to receive any hearing in state court. The plaintiff-parents were separated from their children for a period of 42 days without a hearing--a period ended only by an order of this court. The burdensome irregularities encountered by these plaintiffs in seeking a state forum for their constitutional claims illustrate to this court that in practice the state procedures operate in such a manner as to prevent or, at the very minimum, substantially delay the presentation of constitutional issues. Under such circumstances, abstention would be inappropriate. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1325 (1977).

In addition to the apparent procedural futility of requiring the plaintiffs to proceed with the pending suit, the statutory scheme on its face fares no better. The very nature of the constitutional challenge here is to the fairness of the state procedure. Such being the case, especially when compounded by the irregularities present here, it "plainly appears" that the state forum would not offer these plaintiffs adequate protection in their challenge to the state procedures, even assuming all matters could be raised in a defense to the pending "Suit Affecting the Parent-Child Relationship." *Gibson v. Berryhill*, 411 U.S. 464, 469 (1973).

Therefore, because of the failure of the state to follow its procedures and because of the futile efforts of the plaintiffs to seek relief in the state system,[7] this court finds that there is for these plaintiffs no "opportunity to fairly pursue their constitutional claims in an ongoing state proceeding."

Accordingly, this court holds that abstention is not required because *Younger* principles do not apply to this dispute between the plaintiffs and the State of Texas and, even if such principles do apply, there exist extraordinary circumstances which compel this court to provide a federal forum for the vindication of these plaintiffs' constitutional rights. Having so decided, we must address the merits of the plaintiffs' case.

II. MERITS

At the outset it must be noted that there is no dispute between the parties as to the gravity of child abuse and the compelling state interest in quickly and effectively removing the victims of child abuse from their parents. Similarly, the parties agree that where real, immediate, and irreparable physical harm is likely, the state has an interest in taking so-called "emergency" possession of the children. The gravamen of the plaintiffs' complaint is that in effectuating the legitimate state interest, the TEXAS FAMILY CODE does so in a manner which contravenes basic constitutional principles. They have mounted a broad-based challenge to Chapters 11, 14, 15, 17, and 34 of Title 2, TEXAS FAMILY CODE.

This court has, upon the advice of both parties, carefully viewed the challenged provisions as being interdependent. Briefly, the procedure under surveillance here begins with Chapter 34, which is concerned with the reporting of suspected child abuse and the initial investigative steps by the State Department of Public Welfare. Once suspected abuse is

identified under Chapter 34, Chapter 17 enables the State to take possession of the victims for the "Protection of [a] Child in [an] Emergency."[8] By the terms of Section 17.05(b)(2), the state may then institute a "Suit Affecting the Parent-Child Relationship." This term of art is defined in Section 11.01(5) as

> "a suit . . . in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought."

Such a suit, therefore, refers both to a Chapter 14 proceeding, in which the appointment of a conservator is sought, and to a Chapter 15 proceeding, which is entitled "Termination of the Parent-Child Relationship."

In the suit filed by these defendants at the direction of Judge Lowry, pending in Montgomery County, only Chapter 14 relief was being sought at the time the court issued the preliminary injunction. Consequently, the defendants have questioned the standing of the Sims parents to challenge the constitutionality of any part of Chapter 15. This court finds, however, that the spectre of a Chapter 15 suit involving the Sims family is sufficient to confer standing. *See O'Shea v. Littleton*, 414 U.S. 488 (1974); *Massachusetts v. Mellon*, 262 U.S 447 (1923). The caseworker assigned to investigate the Sims family, Rex Downing, testified in his deposition that he would seek permanent termination of the parent-child relationship as part of the Montgomery County action, which is entitled broadly "Suit Affecting the Parent-Child Relationship."

It is now clear that there is a fundamental right emanating from the Constitution, which protects the integrity of the family unit from unwarranted

intrusions by the state. The Supreme Court in *Stanley v. Illinois*, 405 U.S. 645 (1972) commented:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "rights far more precious than property rights." It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. [Citations omitted.]

405 U.S. at 651. *See also Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1943); *May v. Anderson*, 345 U.S. 528 (1953); *Griswold v. Connecticut*, 381 U.S 749 (1965); *Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974); *Alsager v. Disrict Court of Polk County, Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975); *Roe v. Conn*, 417 F. Supp. 769 (M.D. Ala. 1976). Having emphasized the importance of such a right, courts are required to carefully scrutinize any attempt by a state to intrude upon it. It is axiomatic that where due process must be afforded, the courts must still decide what process is due. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972). In making such an analysis, the competing interests must be identified and weighed. There are three: the liberty and privacy interest afforded to the parents, the interest of the state, as *parens patriae*, in protecting children from harm and, finally, the often silent interest of the child.

Reporting Child Abuse. Chapter 34 of Title 2, TEXAS FAMILY CODE is directed at the preliminary investigative powers of the state before any judicial relief is sought. Although recognizing the need to encourage the reporting and investigation of suspected cases of child abuse or neglect, we find that three aspects of Chapter 34 violate minimal constitutional guarantees. First, to the extent that a court order under § 34.05(c)[9] may be obtained without notice to the parents and upon any showing less than that the relief sought is necessary to aid in the determination of the existence of any abuse, it violates due process by permitting an unbridled invasion of the family unit. There is little doubt that the mandate of due process extends to an investigative stage of state action. Psychological or psychiatric examinations represent such an intrusion into the privacy of the family that, if objected to, should not be ordered without some type of adversary hearing before a judicial body. The state's interest in the protection of the child is not endangered by the requirement of such notice because of the existence, under unusual circumstances, of the course of action available under § 34.05(d).[10]

A second constitutional defect in the system of reporting child abuse appears in Section 34.08, which provides:

> The reports, records, and working papers used or developed in an investigation made under this chapter are confidential and may be disclosed only for purposes consistent with the purposes of this code under regulations adopted by the investigating agency.

Despite assurances from the state that the investigation permitted by Chapter 34 is "nonaccusatory," it is undisputed that the information

gathered pursuant to that chapter is used as a basis for further action by the state under Chapters 17, 14, or 15.

Although some intrusion into a family unit is permissible when the state pursues its interest in investigating reports of abuse, there is no compelling reason to deny the family access to the fruits of that invasion or the conclusions reached. Of course, a certain confidentiality must be maintained for sources of information who request such anonymity, but the reports[11] and records of the state compiled during the investigation should be available to the parents so that they may be fully apprised of the nature of any accusation to be made by the state. Due process requires no less. A state may deny the parents access to the records concerning their family only where the source must remain confidential or where there has been a judicial determination of the need for confidentiality in an adversary proceeding.

Finally, with regard to Chapter 34, this court finds that Section 34.06[12] represents an unconstitutional infringement on the right to privacy and the guarantees of due process. In implementing that section, the State Department of Public Welfare has devised the Child Abuse and Neglect Report and Inquiry System (CANRIS). CANRIS is a computerized system designed to collect and store the confidential information gathered by the state from the inception of an investigation through final disposition. It is clear from the expressed purpose of CANRIS that it goes far beyond the permissible maintenance of investigatory files. The mere filing of a report of child abuse is cause enough for the system to operate. The record in this case indicates that CANRIS places labels of "perpetrator" on those parents who are ensnarled into its web--a conclusion reached by the state without any judicial determination. Similarly, CANRIS may label the

report as "validated," which by the terms of its operation manual is appropriate where "the investigating worker has proved that neglect or abuse exists." This use of information gathering and dissemination absent a judicial determination of abuse neglect is an impermissible violation of due process and right to privacy. Of course, the state may maintain investigative files. However, to the extent that CANRIS purports in any way to be a clearinghouse of child-abuse information without a judicial determination thereof, it is an unconstitutional infringement on the rights of the parents.

The injury to these plaintiffs is far greater than the public damage to the plaintiff's reputation in *Paul v. Davis*, 424 U.S. 693 (1976). In that case, the Supreme Court held that an interest in one's reputation alone was not a "liberty" or "property" interest requiring due process before it could be altered by the State. The Court carefully distinguished "matters relating to marriage, procreation, contraception, family relationship, and child rearing and education" as being "far afield" from that plaintiff's claim. 424 U.S. at 713. Therefore, we find that the current use of a central registry for child-abuse reports is unconstitutional.

Summary Seizure. Although the State of Texas has an interest in protecting children from abuse as quickly as possible, that interest is not sufficient to justify removal of the child without notice and an adversary hearing unless there exists an immediate threat to the safety of the child. Chapter 17 is the attempt by the Texas Legislature to deal with such an emergency.[13] An emergency, however, does not permit the State to disregard all notions of due process. In that regard, we find the procedures of Chapter 17 to be patently and flagrantly violative of basic constitutional guarantees.

Section 17.01 allows the State Department of Public Welfare to take custody of a child in order "to protect him from an immediate danger to his health or physical safety." Such language represents a constitutionally adequate standard.[14] After seizure, however, the "hearing" required by Section 17.02 is, in reality, no more than an ex parte presentation of a petition to a court without actual delivery of the children to the court. Although an ex parte order under these circumstances is, in itself, not constitutionally infirm, and the "hearing" may, pursuant to Section 17.03, proceed "without notice," the due process interest of the parents is such as to require the State to make all reasonable efforts to serve upon them notice of this initial presentation to the court.

Section 17.02 currently requires that the appropriate petition be filed "immediately on delivery of the child to the court" and requires that the ex parte "hearing" be held "to provide for the temporary care or protection of the child." Two constitutional defects exhibit themselves. First, there is no requirement that the hearing itself be held "immediately." Barring unusual circumstances, the State's interest in the protection of the alleged victims of abuse and the resulting usurpation of parental rights does not justify holding this ex parte presentation to a judicial authority beyond the very day of seizure. Secondly, through what this court assumes to be legislative oversight, the hearing is "to provide for the temporary care or protection of the child"--language which assumes that such care or protection is needed.

It is Sections 17.05 and 17.06 that are frought with constitutional defects. After the State takes emergency custody of the child and there has been a preliminary ex parte judicial determination of the propriety of the State's act, a full adversary hearing with notice should

be held at the expiration of the ex parte order. Section 17.05 currently requires no such hearing at the expiration of the initial order and, instead, places a clearly unconstitutional burden on the parents, via Section 17.06, to seek a modification of the order. In the event the children remain in the custody of the State pursuant to the temporary order, due process requires that in all cases a full hearing be held or that the children be returned to the custody of their parents. The fact that the parents may have been present at the initial temporary "hearing" does not relieve the State of the obligation to conduct the full adversary hearing with adequate notice to the parents. Such notice, of course, includes an adequate statement in the petition of the factual allegations upon which the State is relying to support Chapter 17 relief. Furthermore, to the extent that Section 17.05 (b) (2) permits a court to "direct the filing of a suit affecting the parent-child relationship" without having first determined the need therefor in a full adversary hearing, it is an unconstitutional deprivation of due process.

The questions remains as to how long the children, under these emergency situations, may be separated from their parents without a hearing. We regard Section 17.05's suggestion of a ten-day period to be constitutionally acceptable although, in the view of this court, the five-day period upheld in *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), would offer a better solution. The ten-day period, however, may not run from the "date of the [initial] order." Other summary deprivations of a property or liability interest have been upheld for a period measured from the date of the deprivation. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975). The record in the instant case reflects that the date of the seizure and the date of the initial orders may not be the same. Therefore, what this court perceives to be the constitutional limit of ten days must run from the

date on which the State removed the children from the custody of their parents.

In particular, the State may not obtain a ten-day ex parte order under Chapter 17 and then, through the vehicle of Section 17.05(b) (2), institute a suit affecting the parent-child relationship and obtain another ten-day ex parte order under Section 11.11(a) (4). This "stacking" of ex parte orders may result, under current statutory provisions, in a minimum of a twenty-day period during which the parents may be deprived of the custody of their children without an adversary hearing before an impartial tribunal. This court reiterates that under no circumstances, either under Chapter 17 or under Section 11.11(a) (4), may the State retain custody of the child for more than ten days without a complete adversary hearing with notice to the parents.

At the required hearing, the State must make a clear showing that continued custody is necessary to protect the child from physical danger. Even a temporary order under Section 11.11 may be based on no less a showing. Should the State be entitled to continued custody, the nature of the interests here require that a suit affecting the parent-child relationship should commence immediately so that the swiftest resolution of the merits may be obtained.

Standard of Proof. Section 11.15 provides for a preponderance of the evidence standard in any suit affecting the parent-child relationship. While such a suit is not akin to a delinquency proceeding requiring proof beyond a reasonable doubt, *In Re Winship*, 397 U.S. 358 (1970), the fundamental right to family integrity requires at the very least that the State notify the parents of the allegations and prove its case by clear and convincing evidence. *Alsager v. District Court of Polk County, Iowa, supra.*[15]

Appointment of Counsel. Section 11.10 provides in pertinent part:

> (a) In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner or unless an attorney at sic litem has been appointed for the child or unless the court finds that the interests of the child will be represented adequately by a party to the suit and are not adverse to that party.
>
> ....
>
> (c) The court may appoint an attorney for any party in a case in which it deems representation necessary to protect the interests of the child who is the subject matter of the suit.

The plaintiffs have argued that this provision violates the due process clause of the constitution by not requiring the appointment of an attorney for the child. This court agrees. Certainly, "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). In a suit for the involuntary termination of parental rights, the child's interest is generally distinct from that of either the State or the parents. In *In Re Gault*, 387 U.S. 1 (1967), the Supreme Court recognized the separate interest of a child in a juvenile delinquency proceeding as one deserving of constitutional protection.[16] The mere fact that a proceeding under the TEXAS FAMILY CODE is labeled "civil" and a delinquency proceeding as "criminal" simplistically ignores an analysis of the real interests involved and the rights of all parties to a fair hearing. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). Therefore, in any proceeding in which the termination of the parent-child relationship is sought, the court is required to appoint counsel to represent the

interests of the child and require the parents to pay for that representation, if they are able to do so. *Roe v. Conn*, 417 F. Supp. 769, 780 (M.D. Ala. 1976). If, as the statute suggests, another party would adequately represent the interests of the child, an appointment of counsel for the child would be unnecessary as long as such representation was through an attorney. Section 11.10 allows another party to represent the child only if there are no adverse interests. While this condition is constitutionally sufficient on its face, it has been applied unconstitutionally to the extent that the state itself has been appointed as the other party to represent the child. We have repeatedly herein emphasized the separate competing interests necessarily involved in any suit affecting the parent-child relationship. The interest of the state and the interest of the child differ in such a manner that they must be assumed to be adverse until there has been a final adjudication on the merits.

Because of the requirement of an attorney for the child at these proceedings, it follows that it must include representation at an "emergency" proceeding under Chapter 17, the result of which may be the institution of a suit for the termination of the parent-child relationship.

With regard to the appointment of counsel for the parents at any proceeding for the termination of parental rights, it is agreed that the plaintiffs in the *Sims* case, not being indigent, do not raise the issue. The *Woods* case was consolidated with the *Sims* case solely on the right of indigent parents to counsel. This court has carefully studied the arguments of counsel and we concur with the defendants that the named plaintiffs in the *Woods* case lack standing to raise that issue. The record is clear that both plaintiffs Woods and Troncosa were represented in the termination proceedings by counsel provided by the Houston Legal Foundation, a legal services corporation.

The *Woods* case is a class action pending before another judge of this court. In light of recent decisions of this Circuit, it appears that our limited consolidation of the *Woods* case before class certification was ill-advised. *See McArthur v. Southern Airways, Inc.*, 556 F. 2d 298 (5th Cir. 1977); *Satterwhite v. City of Greenville*, ___F.2d___, No. 75-3377 (5th Cir., August 12, 1977). Because there has been no decision as to the maintainablitiy of a class in that case, we only consider the standing of the two named plaintiffs and direct that the issue of the right to counsel for parents in the putative class remain pending with the *Woods* case.

Therefore, for the reasons stated herein, the court finds that the following provisions of Title 2, TEXAS FAMILY CODE--Sections 11.10, 11.15, 17.02, 17.03, 17.05, 17.06, 34.05(c), and 34.08--are unconstitutional on their face; and the defendants are permanently enjoined from applying and enforcing these provisions. Furthermore, the court finds that the use of CANRIS as provided for in Section 34.06 for information gathering and dissemination of child abuse reports absent a judicial determination of abuse or neglect and the use of Section 11.11(a)(4) in conjunction with Chapter 17 to deprive parents of custody of their children for longer than ten days without an adversary hearing are unconstitutional applications of these provisions; and the defendants are permanently enjoined from so applying or enforcing them.

Finally, the plaintiffs have sought monetary relief in the nature of actual damages and punitive damages for what the First Amended Complaint describes as a "wreckless, wilful and wanton disregard" of their rights. Upon careful consideration of the facts of this case, the nature of the constitutional challenge, and the decision of this court, we find no evidence to support the award of any monetary damages.

DONE at Houston, Texas, on the 12th day of *October*, 1977.

s/s
Joe Ingraham
Senior United States Circuit Judge

s/s
John V. Singleton
United States District Judge

s/s
Ross N. Sterling
United States District Judge

FOOTNOTES

[1] The relevant sections of Chapter 17 of the TEXAS FAMILY CODE are as follows:

Section 17.01. Taking Possession in Emergency.

An authorized representative of the State Department of Public Welfare, a law-enforcement officer, or a juvenile probation officer may take possession of a child to protect him from an immediate danger to his health or physical safety and deliver him to any court having jurisdiction of suits under this subtitle. . . . The child shall be delivered immediately to the court.

Section 17.02. Hearing.

Unless the child is taken into possession pursuant to a temporary order entered by a court under Section 11.11 of this code, the officer or representative shall file a petition in the court immediately on delivery of the child to the court, and a hearing shall be held to provide for the temporary care or protection of the child.

Section 17.03. Notice.

The proceeding under Section 17.02 of this code may be held without notice.

Section 17.04. Grounds and Disposition.

On a showing that the child is apparently without support and is dependent on society for protection, or that the child is in immediate danger of physical or emotional injury, the court may make any appropriate order for the care and protection of the child and may appoint a temporary managing conservator for the child.

Section 17.05. Duration of Order.

(a) An order issued under Section 17.04 of this code expires at the end of the 10-day period following the date of the order, on the restoration of the child to the possession of its parent, guardian, or conservator, or on the issuance of ex parte temporary orders in a suit affecting the parent-child relationship under this subtitle, whichever occurs first.

(b) If the child is not restored to the possession of its parent, guardian, or conservator, the court shall:

(1) order such restoration of possession; or

(2) direct the filing of a suit affecting the parent-child relationship in the appropriate court with regard to continuing jurisdiction.

Section 17.06. Modification.

On the motion of a parent, managing conservator, or guardian of the person of the child, and notice to those persons involved in the original emergency hearing, the court shall conduct a hearing and may modify any emergency order made under this chapter if found to be in the best interest of the child.

[2] *Section 11.11. Temporary Orders.*

(a) In a suit affecting the parent-child relationship, the court may make any temporary order for the safety and welfare of the child, including but not limited to an order:

....

(4) taking the child into the possession of the court or of a person designated by the court;

....

(b) Temporary orders under this section are governed by the rules governing temporary restraining orders and temporary injunctions in civil cases generally.

[3] *Section 11.06. Transfer of Proceedings.*

(a) If venue is imporperly laid in the court in which a suit affecting the parent-child relationship is filed, and no other court has continuing jurisdiction of the suit, the court, on the timely motion of any party other than the petitioner, and on a showing that venue is proper in another county, shall transfer the proceeding to the county where venue is proper.

[4] As an example of the Supreme Court's Permitting possible intervention after *Trainor* because of the peculiar nature of the dispute and the interests involved, *see Doe v. Maher*, 414 F.2d

1368 (D. Conn. 1976), *vacated and remanded on other grounds*, ___ U.S. ___, 45 U.S.L.W. 3820 (No. 76-878, June 20, 1977).

[5] For example, the plaintiffs complain of the methods by which child-abuse reports are received recorded and the fact that even anonymous report of child abuse will label the parents as "child abusers" in a central registry, to become part of a national registration system before any judicial proceeding of even an emergency nature. Title 2, TEXAS FAMILY CODE § 34.06.

[6] Some commentators have viewed such a finding as creating an exception of "futility" or "bias" to otherwise applicable *Younger* principles. *See, Developments--Section 1983*, 90 HARV. L. REV. 1133, 1324-26 (1977).

[7] In a recent case, *Ross v. Houston Independent School District*, ___ F.2d ___ (5th Cir. 1977) [Slip Opin. Sept. 8, 1977], the court held:

> The abstention doctrines do not embody jurisdictional principles nor are they to be considered as rules of law. Rather, their application is committed to the exercise of a sound discretion based on the facts of each case. *Hill v. City of El Paso, Texas*, 437 F.2d 352 (5th Cir. 1971). The piecemeal results and delays attendant to abstention should not be imposed on the parties to a federal proceeding unless state court action holds realistic promise of avoiding constitutional issues. *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). Any consideration of abstention, whether under *Pullman* or other doctrines ["(2) to avoid needless conflict with the administration by a state of its own affairs; (3) to leave to the states the resolution of unsettled questions of state law; and (4) to ease the congestion of the federal court docket," C. A. Wright, Law of Federal Courts, 3d ed. 218], must take into primary account its effects on the rights sought to be protected in the court asked to stay its hand.

[8] *See* Title 2, TEXAS FAMILY CODE §§ 34.05(d), *infra* at n.9, which allows the institution of a Chapter 17 proceeding during or as a result of a Chapter 34 investigation.

[9] (c) The investigation shall include a visit to the child's home, a physical and psychological or psychiatric examination of all the children in that home, and an interview with the subject child. If

admission to the home, school, or any place where the child may be, or permission of the parents or persons responsible for the child's care for the physical and psychological or psychiatric examinations cannot be obtained, then the juvenile court, or the district court, upon cause shown, shall order the parents or the persons responsible for the care of the children, or the person in charge of any place where the child may be, to allow entrance for the interview, above examinations, and investigations.

(d) If, before the investigation is complete, the opinion of the investigators is that immediate removal is necessary to protect the child from further abuse or neglect, the investigators shall file a petition pursuant to Chapter 17 of this code for temporary care and protection of the child.

[10] *Id.*

[11] Section 34.05(e) requires the appropriate agency to make a complete written report of their investigation.

[12] *Section 34.06. Central Registry.*

The State Department of Public Welfare shall establish and maintain, in Austin, Texas, a central registry of reported cases of child abuse or neglect. The department may adopt rules and regulations as are necessary in carrying out the provisions of this section. The rules shall provide for cooperation with local child service agencies, including hospitals, clinics, and schools, and cooperation with other states in exchanging reports to effect a national registration system.

[13] The relevant portions of Chapter 17 are set out in note 1, *supra*.

[14] The standard of Section 17.01 is far more acceptable than the one found to be unconstitutional by the court in *Roe v. Conn*, 417 F. Supp. 769 (1976). In that case, Alabama Code, Title 13, § 352(4) provided for emergency custody of the child when "its welfare requires."

[15] *See also* National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 26 (1969); *Singleman*, A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings, 17 ARIZ. L. REV. 1055, 1087 (1975).

[16] *Cf. Hegwood v. Kindrick*, 264 F. Sup. 720 (S.D. Tex. 1967).

ARTICLE 11

JUDGMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-665
Defendants.	§	
DOROTHY MAE WOODS, ET AL.,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO.
RAUL JIMENEZ, ET AL.,	§	76-H-1120
Defendants.	§	

JUDGMENT

Consistent with the opinion of this Court entered in the above causes on October 12, 1977, IT IS ORDERED, ADJUDGED AND DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents

before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That Section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing physical, psychological, or psychiatric examinations is necessary to aid in the investigation of abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their direction, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *23rd* day of *February*, 1978.

s/s

JOE INGRAHAM
Senior United States Circuit Judge

s/s

JOHN V. SINGLETON, JR.
United States District Judge

s/s

ROSS N. STERLING
United States District Judge

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ARTICLE 12

AMENDED JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN PLEASANT SIMS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-665
DOROTHY MAE WOODS, ET AL., Plaintiffs, V. RAUL JIMENEZ, ET AL., Defendants.	)(	CIVIL ACTION NO. 76-H-1120

AMENDED JUDGMENT

Consistent with the opinion of this court entered in the above causes on October 12, 1977, it is ORDERED, ADJUDGED, and DECREED:

I.

That abstention is not warranted and would be improper under the unique and compelling circumstances of Civil Action No. 76-H-665.

II.

1. That Section 11.10 is unconstitutional on its face insofar as it fails to require the appointment of an

attorney ad litem for a child in any suit affecting the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code in which the State is a party.

2. That the use of Section 11.11(a)(4) in conjunction with Chapter 17 of Title 2 of the Texas Family Code to deprive parents of the custody of children for longer than ten (10) days measured from the date of the deprivation, without a full adversary hearing, is an unconstitutional application of said provision.

3. That Section 11.15 is unconstitutional on its face insofar as it fails to require the State to prove its case by clear and convincing evidence in any suit in which the State seeks conservatorship of a child or termination of the parent-child relationship under Chapters 11, 14, 15, and 17 of Title 2 of the Texas Family Code.

4. That Section 17.02 is unconstitutional on its face insofar as it fails to require that the ex parte hearing be held immediately after possession of a child is taken by the State and insofar as it assumes that such hearing will result in a finding that the State's temporary care or protection of the child is needed.

5. That Section 17.03 is unconstitutional on its face insofar as it fails to require the State to make all reasonable efforts to serve notice on the parents of the ex parte hearing to be held immediately after possession of a child is taken by the State.

6. That Section 17.05 is unconstitutional on its face insofar as it fails to require the State to hold a full adversary hearing with adequate notice to the parents before possession of a child taken by the State can be retained by the State beyond ten (10) days.

7. That section 17.06 is unconstitutional on its face insofar as it fails to require the State to hold a full

adversary hearing at the expiration of the ex parte order, if the State seeks to obtain an order to retain possession of the child beyond ten (10) days.

8. That Section 34.05(c) is unconstitutional on its face insofar as it fails to require notice to the parents and a hearing in which the State makes a showing that a court order allowing psychological or psychiatric examinations is necessary to aid in the investigation of the abuse or neglect before such an order is obtained.

9. That the use of the Child Abuse and Neglect Report and Inquiry System (CANRIS) as provided for in Section 34.06 of Title 2 of the Texas Family Code for information gathering and dissemination of child abuse or neglect reports about identified individuals prior to and without a judicial determination of abuse or neglect is an unconstitutional application of said provision.

10. That Section 34.08 is unconstitutional on its face insofar as it fails to require that reports and records of a child abuse or neglect investigation, except the identity of informants, be made available to the parents who are the subject of such an investigation.

11. That Defendants, the Chairman and Members of the Board of the Texas State Department of Human Resources, formerly the Department of Public Welfare, and Commissioner of the Texas State Department of Human Resources, formerly the Department of Public Welfare, their successors, agents, employees, and all other persons acting in concert or cooperation with them, or at their discretion, are hereby permanently enjoined from so applying or enforcing the foregoing provisions.

III.

That this Court's limited consolidation of the issue of right of indigent parents to counsel was ill-advised, but

that that issue shall remain pending in Civil Action No. 76-H-1120 before another Judge of this Court.

IV.

That this Court finds no evidence to support the award of any monetary damages to Plaintiffs.

DONE at Houston, Texas, on the *8th* day of *March*, 1978.

s/s
JOE INGRAHAM
Senior United States
Circuit Judge

s/s
JOHN V. SINGLETON, JR.
United States District Judge

s/s
ROSS N. STERLING
United States District Judge

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Attorneys for Defendants

ARTICLE 13

DEFENDANTS' NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

JOHN PLEASANT SIMS AND WIFE, MARY CARTER SIMS, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILDREN, SABRINA MARIE SIMS, PAUL EDWARD SIMS AND SHAWANA EVETTE SIMS,	§	
Plaintiffs	§	
vs.	§	Civil Action No.
HILMAR G. MOORE, RAUL JIMENEZ, AND JAMIE CLEMENTS, INDIVIDUALLY AND AS CHAIRMAN AND MEMBERS, RESPECTIVELY, OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; JEROME CHAPMAN, INDIVIDUALLY AND AS COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, GENE LEGE, INDIVI-	§	76-H-665

DUALLY AND AS DIRECTOR OF THE HARRIS COUNTY CHILD WELFARE UNIT OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES; AND MARIAN LOCKLEY, INDIVIDUALLY AND AS HEAD PROGRAM DIRECTOR OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES,

Defendants

§§§

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Assistant Attorney General